Supreme Court, U.S.
FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

TONY AND JUANITA ROSS,
Petitioners,

v.

FORD MOTOR CREDIT COMPANY,
A CORPORATION,
Respondent.

Petition for Writ of Certiorari to the Missouri Court of Appeals Western District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the issuance of 39 pre-judgment orders of delivery in replevin, void because there was no statement of fact, under oath, showing the replevinor was entitled to possession of the property, by fifteen different judges in a period of less than 26 months in a State Judicial Circuit having eighteen Judges sufficient evidence of a state enforced Judicial custom or usage to impose liability, under title 42 U.S.C. § 1983, upon a private party who willfully participated and acted jointly with a state judge to invoke the custom or usage?

2. Does Missouri Revised Statutes 1986 § 105.240, as construed and applied by the Missouri Court of Appeals to justify a private party's search of a replevinee's locked home and seizure of property therein with the assistance of a Deputy Process Server, who did not rely upon or comply with the provisions of the Statute and who permitted the private party to forcibly enter a home and remove property therefrom when no one was there and when there had been no service of process, or of the required notice of replevinee's rights, in the replevin action, violate Amendments IV, V or XIV of the Constitution of the Unites States?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Missouri Court of Appeals, Western District were the Petitioners, Tony Ross and Juanita Ross, and the Respondent, Ford Motor Credit Company, a Corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Tony and Juanita Ross respectfully petition for a writ of certiorari to review the judgment of the Missouri Court of Appeals, Western District in this case.

OPINION BELOW

The opinion of the Missouri Court of Appeals, Western District was filed October 12, 1993 and modified on the court's own motion on November 23, 1993. The case is reported at 867 S.W.2d 546 and the opinion is reprinted at Appendix A (App.A at 1a - 26a).

JURISDICTION

Timely motion for rehearing and/or transfer to the Supreme Court of Missouri was denied by Missouri Court of Appeals November 30, 1993 (App.A at 27a) and timely application in the Supreme Court of Missouri to transfer was denied Jan. 25, 1994. (App.A at 28a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. IV,
U.S. Const., Amend V,
U.S. Const., Amend XIV,
42 U.S.C. § 1983,
Mo.Rev.Stat. 1986, § 105.240
Mo.Rev.Stat. 1986, § 544.200
Missouri Supreme Court Rules 54.12, 54.13, 99.01-99.09 and 99.15

The above Constitutional amendments, Statutes and

Missouri Supreme Court Rules are lengthy and their pertinent text is set forth in the Appendix as authorized by Supreme Court Rules, Rule 14(f) (App.A at 30a - 36a)

TITLE 28 § 2403(b) NOTIFICATION

Pursuant to Rule 29.4(c) of the Rules of the United States Supreme Court, petitioners recite that 28 U.S.C. § 2403(b) may be applicable because the constitutionality of a statute of the State of Missouri is drawn into question and the State of Missouri is not a party.

STATEMENT OF THE CASE

This case arose out of a replevin action filed by Ford Motor Credit Co., (Ford Credit) against the Plaintiff Tony Ross. An unusual aspect of that case was that Ford Credit was not Mr. Ross' creditor and Mr. Ross was not a debtor. The pertinent facts are, for the most part, correctly set out in the courts opinion.

Plaintiffs filed suit, pursuant to Missouri procedure against the last officers and directors of North Hills Lincoln Mercury Mazda Inc., a defunct corporation, as statutory trustees for the corporation (North Hills), against Ford Credit and others. Plaintiff recovered a judgment for actual and punitive damages against North Hills on Count I (conversion 1976 Buick) and Count II (fraud and deceit). North Hills did not appeal the judgments and settlement was had with the parties other than North Hills and Ford Credit. Count III (deprivation of property without due process of law) and

Count IV (unreasonable search and seizure) were brought pursuant to the provisions of 42 U.S.C. § 1983.

Plaintiff's evidence was that in November of 1979 Tony Ross and his wife Juanita were the owners of a 1976 Buick Electra automobile financed through First National Bank of Independence on which there was a small balance owing. On approximately November 6, 1979 Plaintiff Tony Ross went to North Hills to look at automobiles. Mr. Ross, at the request of North Hills, signed a retail buyers order made out to he and his wife for the purpose of protecting North Hills from liability under the terms of its insurance while Mr. Ross test drove a 1979 Mercury Grand Marquis demonstrator. Mr. Ross left the 1976 Buick automobile at North Hills while he test drove the Mercury. He drove the Mercury to his home, took his wife on a test drive and returned the 1979 Mercury that same evening and picked up the 1976 Buick and left in it.

On November 7, 1979 Mr. Ross returned to North Hills and was requested to test drive the Mercury overnight. Mr. Ross left the Buick with North Hills while test driving the Mercury. After returning the Mercury a number of times and being requested by North Hills to drive it a few more days, over the weekend, or for a week, Mr. Ross returned the Mercury to North Hills and asked for the return of the 1976 Buick. North Hills advised Mr. Ross that his 1976 Buick was in Denver. Mr. Ross demanded the return of his Buick and advised North Hills that he would not give them back the 1979 Mercury until his 1976 Buick was returned.

Mr. Ross returned to North Hills with the Mercury automobile a number of times thereafter demanding his 1976 Buick and was told that the Buick had been sold. Mr. Ross kept the 1979 Mercury automobile as security for the return of or the payment of the fair market value of the Rosses' 1976 Buick and North Hills never asked him to return the Mercury.

North Hills subsequently obtained the title to the Rosses' 1976 Buick from First National Bank of Independence by use of a forged power of attorney to assign title and by paying off a small loan balance on the Buick on December 20, 1979. North Hills subsequently sold the Rosses' Buick on January 9, 1980.

On November 16, 1979, North Hills sold and assigned a Missouri automobile retail instalment contract bearing a forged signature of Mr. Ross to Ford Credit. The assignee of the retail instalment contract was by its terms subject to all claims and defenses which the debtor had against the seller and the assignment of the contract to Ford Credit contained a full repurchase agreement by North Hills.

On December 18, 1979 Ford Credit mailed a payment coupon book to Mr. Ross seeking to collect payments on the retail instalment contract. On receipt of the booklet Mr. Ross immediately advised Ford Credit that the instalment sale contract bearing his signature was a forgery, that he had not purchased the 1979 Mercury and that he was holding the 1979 Mercury as security for the return of or the payment of the fair market value of his 1976 Buick. Ford Credit made

no effort to collect the money paid for the assignment from North Hills and North Hills went out of business approximately March 1, 1980.

Although, Mr. Ross had personally advised the assistant branch manager of Ford Motor Credit's Kansas City office that the instalment contract was forged, on March 4, 1980 Ford Credit filed the replevin action involved herein.

On March 5, 1980 Ford Credit obtained a pre-judgment order of delivery in replevin of the 1979 Mercury. (App.A at 37a) Replevin actions in Missouri are of statutory origin but the statutes have been superseded by and the action in replevin is now procedurally governed by Missouri Supreme Court Rules, Rule 99 et seq. (hereafter Rules) (App.A at 33a - 36a)

Plaintiff Ford Credit's affidavit in support of its petition for pre-judgment order of delivery in replevin was conclusory and did not state facts sufficient to invoke the jurisdiction of the court to issue the order as required by Rules 99.03(b) and 99.04. Petitioners and Ford Credit entered into a stipulation in open court in the presence of the jury that; the petition, affidavit and order of delivery in replevin in the case being tried to the jury was substantially the same as the petitions, affidavits and orders of delivery in replevin in 38 separate cases which plaintiffs had introduced into evidence, and that all of the cases were conclusory and did not state facts under oath by affidavit sufficient to show that Ford Credit was entitled to possession of the replevined property and thereby failed to comply with the requirements

of Missouri law to obtain pre-judgment orders of delivery in replevin. The court took judicial notice that the court of appeals found such affidavits of Ford Credit insufficient on May 4, 1982 in the case of *State ex rel. Tallen v. Marsh*, 633 S.W.2d 455 (Mo.App W.D.1982). The 38 cases in addition to this case which plaintiffs introduced into evidence were introduced as evidence of a judicial custom or usage in existence in Circuit Court for the 16th Judicial Circuit of Missouri. All 39 cases, including this one were issued in a period of less than 26 months and signed by 15 separate judges in the 18 judge circuit.

The geographic boundaries of the Sixteenth Judicial Circuit of Missouri are the same as those of Jackson County, Missouri. It's judges, like those in *Gregory v. Ashcroft*, ___U.S.___, 111 S.Ct. 2395, 115 L.Ed. 410 (1991), are appointed by the Governor, and are subject to stand retention elections every six years. They are paid by the State.

Ford Credit thereafter invoked a custom of requesting a civil process server to permit plaintiffs in replevin to unlock the locked homes of defendants in replevin when no one was at home and take property described in the replevin order when the defendants in replevin had not been served with any of the pleadings, orders or notices required by the Rules. On March 10, 1980 Ford Credit obtained a locksmith and met deputy process server Alfred Ferguson at the plaintiff's home when no one was home and the process server, as was the custom, stood by while the locksmith unlocked the door of plaintiff's locked attached garage and Ford Credit was given custody of and removed the Mercury

automobile from the attached garage. Service of the petition, affidavit, order of delivery and the notice required by Rule 99.05 were not served until March 12, 1980. Both Alfred Ferguson, execution deputy with the circuit court for the 16th Judicial Court of Missouri, Civil Process Division and Mr. Charles Beckner, the former Director of Civil Process for the Court Administrators office in Jackson County, Missouri from August 1, 1972 until December 31, 1984 testified that from 1979 through 1984 in Jackson County, if a deputy went to someone's home and found no one at home and the property he was to seize was inside the house or enclosure, unless otherwise requested by the replevin plaintiff, he would leave the location and go back and try to serve them at a later time. They both testified that it was their custom, if requested by the replevin plaintiff, to permit the replevin plaintiff to obtain a locksmith and to enter the house or enclosure and remove replevined property when no one was at home.

On May 29, 1980, on motion of plaintiff, the Circuit Court ordered that the prior order of delivery in replevin entered March 5, 1980 should be and was quashed.

The question of the constitutionality of Missouri Revised Statutes 1986 § 105.240 (hereafter RSMo.) (App.A at 30a) as well as the constitutionality of Rule 99 itself was first raised in Plaintiff's First Amended Petition For Damages in Multiple Alternative Counts, pertinent portions of which are included in the appendix (App.A at 38a - 44a). The trial court, after hearing the evidence, directed verdicts on the issues of liability on Counts III and IV.

During the trial of the case there was no evidence that the process server or anyone else relied upon RSMo. §105.240 or complied with its requirements. The process server thought that the order of delivery authorized him to permit the action taken by Ford Credit. Although Ford Credit contended it was protected by its provisions on appeal, it was not necessary to challenge its constitutionality on appeal.

The question of whether Mr. Ross' signature was forged on the retail instalment contract and accompanying documents was decided favorably to petitioners with reference to Count VII (Conversion).

A WRIT OF CERTIORARI SHOULD BE GRANTED THIS CASE FOR THE FOLLOWING REASONS

I

A. THE MISSOURI COURT OF APPEALS HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, AND

B. THE MISSOURI COURT OF APPEALS HAS DECIDED FEDERAL QUESTIONS IN A WAY THAT CONFLICTS THE APPLICABLE DECISIONS OF THIS COURT.

II

A. THE MISSOURI COURT OF APPEALS HAS CONSTRUED AND APPLIED MISSOURI REVISED STATUTE 1986 § 105.240 IN THIS CASE IN A MANNER WHICH RENDERS THE STATUTE UNCONSTITUTIONAL.

B. THE COURTS INTERPRETATION AND APPLICATION OF § 105.240 RENDERS MISSOURI SUPREME COURT RULE 99.05 A NULLITY AND RENDERS THE PROCEDURE FOR REPLEVIN GOVERNED BY MISSOURI SUPREME COURT RULE 99 UNCONSTITUTIONAL.

C. THE MISSOURI COURT OF APPEALS INTERPRETATION AND APPLICATION OF § 105.240 MAKES MISSOURI REVISED STATUTE 1986 § 544.200 MORE RESTRICTIVE MAKING AN ARREST IN A CRIMINAL ACTION

THAN § 105.240 IS IN EXECUTING AN ORDER FOR THE DELIVERY OF PERSONAL PROPERTY IN A PURELY CIVIL MATTER.

ARGUMENT

I

A. The specific questions of Federal law which have not been, but should be, settled by this Court are:

1. Does a well settled and persistent pattern of conduct of Circuit judges in a State Judicial Circuit (geographical area) in failing to enforce the provisions of Rule 99.03 (b) and failing to comply with the provisions of Rule 99.04, resulting in the issuance of void pre-judgment orders of delivery in replevin, "spring from a state policy" and "constitute a state custom"?
2. Was the judicial custom a state enforced custom?
3. Is a private Defendant willfully participating and acting jointly with a state Circuit judge to invoke a judicial custom which causes an unconstitutional deprivation of property a "state actor", satisfying the 14th Amendment requirements of state action?
4. Was the judicial custom state enforced?

The Missouri Court of Appeals, erroneously relying on the opinions in *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3rd Cir.1990) and *Herrera v. Valentine*, 653 F.2d 1220 (8th Cir.1981), held that the custom or usage

established in the evidence, to constitute state action, must spring from a state policy and that judicial errors on the trial court level could not be held to represent a state policy. The court then found that the custom was not a state enforced custom and held in effect the private defendant willfully participating and acting jointly with a state circuit judge to invoke an unconstitutional judicial custom or usage was not a state actor.

While these questions appear at first glance to have been decided by this court's opinion in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598 (1970), this court has never specifically held that a private defendant willfully participating and acting jointly with a state judge to invoke an unconstitutional custom or usage of the judges of a State Judicial Circuit is a state actor and acting under color of law satisfying the requirements of the 14th Amendment to the Constitution of the United States and Title 42 U.S.C. § 1983.

This court in *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183 (1980) held that private parties who conspired with an absolutely immune state judge were acting under color of state law in bringing about a deprivation of constitutional rights under Title 42 U.S.C. § 1983.

Lugar v. Edmondson Oil Company, 457 U.S. 922 (1982), 941-942, 102 S.Ct. 2744, 2756 (1982) approved the rule articulated in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598 (1970), in the context of an equal protection deprivation, approved the quotation therein contained from *United States v. Price*, 383, U.S. 787, 794,

86 S.Ct. 1152, 1157 (1966) and held that a private party's joint participation with the clerk of a State Court in invoking an apparently valid, but unconstitutional state attachment statute was a state actor for purposes of the 14th Amendment and acting under color of law for the purposes of Title 42 U.S.C. § 1983. This case differs from *Lugar v. Edmondson Oil Company*, supra, and *Dennis v. Sparks*, supra, only in the respect that here the private party willfully participated and acted jointly with a state circuit judge to invoke an unconstitutional judicial custom existing in a state judicial circuit.

In this case, as in *Lugar*, supra, Ford Credit, insofar as it misused the procedure for replevin set forth in Rule 99 was a private actor. For that misconduct Petitioners could bring only state action. Petitioners did bring state actions in Count V (Abuse of Process) and Count VI (Malicious Prosecution). Insofar as Ford Credit willfully participated and acted jointly with a State Circuit Judge to cause an unconstitutional Judicial Custom (fairly attributed to the State) to be invoked, it was a state actor. In this context "state action" and "under color of law" are the same. *Lugar v. Edmondson Oil Co.*, supra.

The Missouri Court of Appeals held that the evidence did not support a state enforced custom or custom having the force of law. Upon those findings the court held there was no evidence that Ford Credit was in any sense a state actor in depriving the Ross' of their 14th Amendment Constitutional due process rights, though the Court of Appeals specifically found that the replevin order was void,

the seizure thereunder was improvident and a violation of the Rosses' constitutional rights.(App.A at 6a -7a) The absence of specific facts as required by the affidavit requirement of rule 99.03 (b) was a jurisdictional defect that rendered the order of delivery in replevin void. *State ex rel. Tallen v. Marsh,* supra at 462.

This court should explicitly settle the question once and for all as to whether a private defendant willfully participating and acting jointly with a state circuit judge in invoking a well settled and persistent practice of the judges of a State Judicial Circuit in issuing pre-judgment orders of delivery in replevin, clearly not authorized by Rules 99.03(b) and 99.04, were state actors and acting under color of custom or usage within the meaning of Title 42 U.S.C. § 1983.

B. The Missouri Court of Appeals has decided several federal questions in a way that conflicts with applicable decisions of this Court. The decisions in conflict with the decisions of this court are as follows:

1. The Court of Appeals stated: "Granting pre-hearing orders of delivery upon factually inadequate applications, if a 'custom or usage' in replevin cases in the Circuit Court of Jackson County, was, first not a custom or usage of the state, and, second, the invalid pre-hearing order in the present case was in any event not caused by the custom or usage." (App.A at 9a)

The above statement is in conflict with this Court's

decision in *Adickes v. S.H. Kress & Co.*, 388 U.S.144, 167-168, 90 S.Ct.1598, 1613-1614, where this Court has said: "We think it is clear that a 'custom or usage of [a] state' for purposes of § 1983 must have the force of law by virtue of the persistent practices of state officials." "...Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law."

2. The Missouri Court of Appeals stated: "The custom or usage, to constitute state action, must spring from a state policy. It would be an odd thing that judicial errors on the trial court level could be held to represent a policy of the state."[6] (App.A at 11a)

[6] 'Proof of repeated acts (of constitutional violations) has been made in some cases to show notice to the responsible policy makers of the state. If responsible policy makers fail to take action to prevent continued constitutional violations, then a plaintiff has shown state action, which may be actionable under § 1983. *See Andrews v. City of Philadelphia*, 895 F.2d 1469 (3rd Cir.1990); *Herrera v. Valentine*, 653 F.2d 1220 (8th Cir.1981).'

This decision is in conflict with *Lugar v. Edmondson Oil Company*, supra and *Dennis v. Sparks*, supra.

Andrews v. City of Philadelphia, supra, was a suit brought by female police officers against their employer and supervisors claiming sexual discrimination and harassment. *Herrera v. Valentine*, supra, was a civil rights action by an Indian woman against a city police officer and the city alleging she has been mistreated by a police officer and that

the city had failed to remedy known unconstitutional conduct of its police officers.

The appellate Court's interpretation of state policy was obviously in error. The cases noted in its footnote were not material to any issue in this case. It is clear since the opinion in *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978) that if one seeks to hold a local government entity responsible in § 1983 cases for activities based on customs of its officials or employees, who are not themselves policy makers for the local government entity, it is necessary to prove a well established and persistent pattern of conduct of which the policy makers for the particular governmental entity were aware and that they failed to take corrective action with reference thereto. This case, like *Lugar*, supra, was brought only against the private defendant Ford Credit. It is neither necessary that the circuit judges be policy makers nor that any supervisory personnel (Missouri Supreme Court) have knowledge thereof.

3. The Court of Appeals erred in stating: "We fail to find any 'state enforced custom' in the present case or any 'custom having the force of law.'" (App.A at 12a)

This finding is in conflict with *Adickes v. S.H. Kress & Co.*, supra. A custom of the state need not have state wide application. The custom here alleged was a custom of the judges of the 16th Judicial Circuit of Missouri and the uncontroverted evidence in the case was that they were enforced by an execution deputy with the Jackson County Circuit Court, Civil Process Division. When property, the

right to possession of which is disputed, is taken from the possession of one and given to another, upon a judicial order granted on an ex parte application, by a civil process server (an officer of the court) one could hardly question that the custom by which the orders were erroneously issued had the force of law.

4. The Court of Appeals erred in stating: "We have been unable to find any definition by which one could identify a 'custom or usage of (the) state' which, upon its causing the deprivation of constitutional rights, would give rise to a § 1983 action. It would be a rare case where the orders of a nisi prius judge, acting in a judicial capacity with subject matter jurisdiction, in a dispute between litigants, could be characterized as action of the state. A judge, while in a sense a state official, is not a policy maker of the state." (App.A at 12a)

The first statement is clearly in conflict with the prior discussion of the decisions of this Court in *Adickes*, supra and *Dennis v. Sparks,* supra. "In the same way that a law whose source is a town ordinance can offend the 14th Amendment even though it has less than state-wide application, so too can a custom with the force of law in a political subdivision of a state offend the 14th Amendment even though it lacks state-wide application. In summary, if Petitioner can show (1) the existence of a state enforced custom of segregating the races in public eating places in Hattiesburg at the time of the incident in question; and (2) that Kress' refusal to serve her was motivated by that state-enforced custom, she will have made out a claim under §

1983." *Adickes,* 398 U.S. 144, 173-174, 90 S.Ct. 1598, 1616-1617.

Petitioner has shown (1) the existence of a state enforced custom existing in the 16th Judicial Circuit of Missouri and (2) Ford Credit's obtaining the order of delivery in replevin was motivated by that state enforced custom.

In *Dennis v. Sparks,* 449 U.S. 24 at 27, 101 S.Ct. 183 at 189, this Court reaffirmed that its cases hold that to act 'under color of' state law for 1983 purposes does not require that the defendant be an officer of the state. It is enough that he is a willful participant in joint action with the state or its agents. The court reaffirmed that private persons, jointly engaged with state officials in the challenged action are acting 'under color' of law for purposes of 1983 action. This court held that where the allegations were that an official act of a state judge having subject matter jurisdiction was the product of a conspiracy, the private parties conspiring with the judge were acting under color of state law and were subject to liability under § 1983.

5. The Court of Appeals erred in stating: "there is no evidence that Ford Motor Credit was in any sense a state actor in depriving the Rosses of their 14th Amendment constitutional due process rights." (App.A at 13a)

This statement is in conflict with this Court's decision in *Adickes,* supra wherein this Court said: "This interpretation of custom recognizes that subtle practices of

state officials may, by imposing sanctions or withholding benefits, transform private predilections into compulsory rules of behavior no less than legislative pronouncements." *Adickes v. S.H. Kress & Co.*, 398 U.S. at 168, 90 S.Ct. at 1613-1614 (1970) "For state action purposes it makes no difference whether the unconstitutional act by the private party is compelled by a statutory provision or by a custom having the force of law--- in either case it is the state that has commanded the result by its law." *Adickes*, supra 398 U.S. at 171, 90 S.Ct. at 1615.

The evidence which Justice Black, in his concurring opinion in *Adickes*, believed sufficient to submit the issue of "custom" to the jury appears at 398 U.S. 177, 178; 90 S.Ct. 1618-1619. [1] It is apparent from *Adickes* as well as other cases that a custom of a political subdivision, in this case a judicial circuit is sufficient. It need not be state wide, it is a custom when it exists in a well defined geographical area and is enforced by state officials.

The invalid order in this case was caused by the well established and persistent pattern of conduct of the judges of the 16th Judicial Circuit of Missouri (a well defined geographical area) failing to enforce the plain language of Supreme Court Rule 99.03(b), of failing themselves to follow

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[1] When asked whether she had occasion to know specific instances where white persons in the company of negroes were discriminated against, Ms. Adickes could recall only three instances, they were all apparently in the city of Hattiesburg, Mississippi and it is apparent from the opinion that the state officials enforcing the custom were members of the Hattiesburg, Mississippi Police Department.

the clear mandate of Rule 99.04 and the persistent issuance by them of invalid orders of delivery. If there had been no such custom, the existence of which Ford Credit was fully aware, the invalid order of delivery in replevin would not have issued in this case. The evidence that Ford Credit willfully participated and acted jointly with a state judge in obtaining the pre-judgment order of delivery in replevin was sufficient to make it a state actor for purposes of the 14th Amendment and acting under color of law in participating in the deprivation of possession of the Mercury automobile, in violation of Amendments V and XIV of the United States Constitution. *Lugar v. Edmondson Oil, Co.*, 457 U.S. 922, 941-942, 102 S.Ct. 2744, 2756.

II

A. The Missouri Court of Appeals has interpreted and applied Missouri Revised Statute 1986 § 105.240 to authorize an officer to break open doors and enclosures to execute an order for the delivery of personal property where there has been no reliance by the officer upon the statute (the officer relied on the order of delivery which did not itself authorize forcible entry into enclosures), there was no public demand and announcement of his official character, as required by the statute, no refusal to open doors after public demand and there had been no service of process, including summons, petition in replevin, affidavit required by Rule 99.03(b) or the notice required by Rule 99.05 advising the defendant of his right to file a redelivery bond and retain possession of the property and of his right to make a written demand for a hearing to determine plaintiff's right to

possession of the property pending trial on the merits, all without a warrant authorizing entry into the enclosure or seizure of property therein contained and without an order of the replevin court authorizing such procedure.

Under the above circumstances, the Missouri Court of Appeals held that "the procedure was justified by § 105.240 RSMo. 1986." (App.A at 14a) It also held that the action of the officers in this case was not unreasonable and further held that the case of *Soldal v. Cook County*, __U.S.__, 113 S.Ct. 538, (1992) does not help the Rosses. In all of these statements the court erred. In *Soldal* the Court held that the 7th Circuit Court of Appeals, the opinion of which it was reviewing, had acknowledged what is evident from this Court's precedents--that the 4th Amendment's protection applies in the civil context as well as the criminal. In *Soldal v. Cook County*, supra, at 546, footnote 11, this Court stated "we reaffirm today our basic understanding that the protection against unreasonable searches and seizures fully applies in the civil context". In *Soldal v. Cook County*, supra, at 547, footnote 12, this court cited *Specht v. Jensen*, 832 F.2d 1516 (1987), reversed on other grounds 853 F.2d 805 (10th Cir. 1988), with which the 7th Circuit had expressly agreed.

In *Specht v. Jensen*, supra, the facts were almost identical to the facts in this case except that there was no seizure in that case. A private citizen, Ken Jacobs, attempted to repossess a computer that had previously been repossessed from Jacobs by the Spechts' son, Timothy. Jacobs obtained a state court order of possession and writ of

assistance that directed any sheriff to assist Jacobs in obtaining the computer. Jacobs, with the assistance of police officers, using the order of possession, conducted non-consentual warrantless searches of Mr. Specht's office and of the home of Mr. and Mrs. Specht.

The *Specht* court stated that the United States Supreme Court has never implied that the existence of a constitutional violation hinges upon the officials mental state. This Court has balanced the 'nature and quality of the intrusion on the individuals 4th Amendment interest against the importance of the governmental interests alleged to justify the intrusion', citing *United States v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2637, 2642 (1983) and *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 1699 (1985) and *Michigan v. Summers*, 452 U.S. 692, 700 n. 12 101 S.Ct. 2587, 2593 n. 12. The court held in *Specht*, supra at 1520, that when a governmental official affirmatively facilitates or encourages an unreasonable search performed by a private person a constitutional violation occurs.

Except in certain carefully defined classes of cases, "a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant. *Camera v. Municipal Court*, 387 U.S. 523, 528-529, 87 S.Ct. 1727, 1731 (1967). The court there cited the explanation of the court in *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369 as follows: "The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from

surveillance. When the right of privacy must reasonably yield to the right of search is as a rule to be decided by a judicial officer and not by a policeman or government enforcement agent." The court further stated U.S. at 530, S.Ct. at 1732 "It is surly anomalous to say that the individual and his private property are fully protected by the 4th Amendment only when the individual is suspected of criminal behavior." In *Camera,* supra, the court held that the right of an inspector from the Division of Housing Inspection of the San Francisco Department of Public Health to make a non-consentual inspection of a ground floor apartment was within the protection of the 4th Amendment to the Constitution of the United States. Petitioners contend that it is surely anomalous to say that an officer executing an order for the delivery of personal property has a greater right to make forcible entry into dwellings, houses, or other buildings or enclosures than an officer has to make a warrantless arrest in a criminal action where the interests of the state is in the apprehension of criminals.

Soldal v. Cook County, __U.S.__, 113 S.Ct. 538, 543 held that a 'seizure' of property occurs when 'there is some meaningful interference with an individuals possessory interest in that property.' *United States v. Jacobs,* 466 U.S. 109, 113, 104 S.Ct. 1652, 1656 (1984) In *Soldal,* a mobile home was ripped from its mooring and towed away. There was no entry into the mobile home and thus no search. In holding the 4th Amendment which was made applicable to the states by the 14th Amendment extended to a seizure of property even though there had been no search, the Court at 113 S.Ct. at 549 stated: "'reasonableness is still the ultimate

standard' under the 4th Amendment, *Camera v. Municipal Court,* 387 U.S. 539, 87 S.Ct. 1736... as is true in other circumstances, the reasonableness determination will reflect a 'careful balancing of governmental and private interests.'"

It can hardly be argued the state has a greater interest in assisting an alleged creditor in obtaining possession of collateral security from an alleged debtor in default than an individual has to be secure in his person, house, papers and effects against unreasonable searches and seizures. The court's order of delivery in replevin in this case did not authorize forcible entry into petitioner's home nor did it authorize an unreasonable seizure of the property within its confines without there having been service of the notice required by Rule 99.05 and a refusal to deliver the property to the process server by the petitioner. (App.A at 37a)

Construing and applying RSMo. § 105.240 to authorize an officer to break open doors and enclosures to execute an order for the delivery of personal property when there has been: (1) no reliance by the officer upon the statute; (2) no public demand and announcement of his official character, as required by the statute; (3) no refusal to open doors; and/or (4) no service of process including summons, order of delivery in replevin or the notice required by Missouri Supreme Court Rule 99.05 advising defendant of his right to file a redelivery bond and retain possession of the property and of his right to make written demand for a hearing to determine plaintiff's right to possession of the property pending trial on the merits; all without a warrant authorizing entry to the enclosure or seizure of the property

contained therein and without an order of the replevin court authorizing such conduct, renders Missouri Revised Statute § 105.240 unconstitutional.

Under such circumstances, the entry by Ford Motor Credit, with the substantial assistance of Deputy Ferguson and the seizure of the Mercury Automobile was clearly a violation of the petitioner's Fourth and Fourteenth Amendment Rights. The Court of Appeals finding that the mere existence of a statute, upon which the officer did not rely or with which the officer did not comply, made Ford Credit's unreasonable search of the Rosses locked attached garage and unreasonable seizure of the Mercury from within that enclosure reasonable, is in error and contrary to the cases cited herein.

B. The Missouri Court of Appeals interpretation and application of § 105.240 renders Missouri Supreme Court Rule 99.05 a nullity and makes the procedure in replevin governed by Missouri Supreme Court Rule 99 unconstitutional.

The evidence of the usual and ordinary procedure followed by Jackson County process servers in executing replevin orders-that is, in standing by while a locksmith opened the door, and allowing the plaintiff to take possession of and remove the property described in the order of delivery was uncontroverted in this case.

In *State ex rel. Tallen v. Marsh*, supra, the Missouri Court of Appeals Western District held that the Missouri

Supreme Court's Amendment of its Rule 99 effective December 1, 1977 was obviously meant to adopt the standards of *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974), wherein at 416 U.S. 606, footnote 7, the Court noted that "when a writ is issued by a judge it is served upon the debtor by the sheriff, Art. 3504, who thereafter becomes responsible for the property's safe keeping. The Missouri Supreme Court must have believed, that the *when* quoted above is an extremely important *when*. There could be no other reason for the directive language of Rule 99.05 mandating that "*When* a pre-judgment seizure of property is made, a written notice *shall be served* on defendant..." (App.A at 34a) (Emphasis added)

In *Mitchell*, supra, the Court was determining the constitutionality of Louisiana Sequestration Statute and the case involved, its application to a vendor's lien, which expired if the buyer transferred possession. The seller would need to establish, in any event, the probability that his case will succeed to warrant the bonded sequestration of the property pending outcome of the suit, 416 U.S. 600 at 609. Additionally, the debtor was entitled immediately to have a full hearing on the matter of possession following the execution of the writ, thus cutting to a bare minimum the time of creditor or court supervised possession.

As previously noted with regard to footnote 7 in *Mitchell*, supra, the sheriff serves the writ upon the debtor pursuant to Article 3504, who thereafter becomes responsible for the property's safe keeping (stakeholder). The Missouri

procedure, on the other hand, provides that the executing officer take the property from the defendant and deliver it to the plaintiff. There is no court supervised possession of the property during the period of time necessarily involved in filing a written request for a hearing on the plaintiff's right to possession, (which must be granted within 10 days after written application is made) whereas, the Louisiana law expressly provides for an immediate hearing and dissolution of the writ unless the plaintiff proves the grounds upon which the writ is issued, Article 3506.

Aside from these differences and assuming that Rule 99 is otherwise constitutional, it seems rather senseless to provide a right to post a redelivery bond and retain possession of the property and a right to make a written demand for hearing which must be granted within 10 days, if the execution deputy is not required to serve the Rule 99.05 notice advising the replevin defendant of those rights either prior to or at the time of the taking of the property.

The Louisiana procedure approved in *Mitchell v. W.T. Grant Co.*, supra, clearly required that the alleged debtor be notified either prior to or at the time of the taking of his property of his right to post a bond and regain possession pending the outcome of the case or to demand an immediate post-seizure hearing. If this interpretation of the holding in *Mitchell* is correct, then the Missouri Court of Appeal's interpretation of § 105.240 renders Rule 99.05 a nullity and effectively eliminates any requirement that service of process of any sort or service of the notice required by Rule 99.05 be served upon a replevin defendant either prior

to or at the time of the taking of the property. As a result, Missouri Supreme Court Rule 99 is unconstitutional in that it fails to comply with the guidelines of *Mitchell v. W.T. Grant Co.*, supra.

C. The Missouri Court of Appeals interpretation and application of RSMo. § 105.240 makes Missouri Revised Statute 1986 § 544.200 (App.A at 31a) more restrictive for an officer making a warrantless arrest in a criminal action than RSMo. §105.240 in executing an order for the delivery of personal property in a purely civil matter.

RSMo. § 105.240 was enacted in 1849, prior to the ratification of the 14th Amendment, and prior to the enactment of 42 U.S.C. § 1983. Petitioners are unable to find any historical note that it has ever been amended. RSMo. § 544.200 first appeared according to the historical notes in the Revised Statutes of Missouri 1855 pg. 1166 § 38. Again, historical notes do not indicate that it has ever been amended. RSMo. § 544.200 pertains to an officer attempting to make a warrantless arrest in a criminal action. § 544.200 clearly states that he may only break open any outer or inner door or window of a dwelling house or other building or any other enclosure, if, after notice of his office and purpose, he be refused admittance. Petitioners believe § 105.240 has the same meaning, but its meaning is not clearly stated.

CONCLUSION

Borrowing from and modifying a quotation from

Representative Garfield in *Adickes*, supra at 398 U.S. 167-168, 90 S.Ct. 1613-1614, Petitioners contend that even if Rule 99 is fair and constitutional on its face, yet by a systematic maladministration of the Rule, or a neglect or refusal to enforce the provisions of the Rule, people may be deprived of their constitutionally protected rights. Although contrary to Rule 99, the practices of the Circuit Judges of Jackson County Missouri, as shown by the evidence, were so well settled as to constitute a "custom or usage" with the force of law.

Petitioners further urge this court to issue its Writ of Certiorari in this case because Ford Credit acting together with a deputy process server made forcible entry into a portion of their home, in their absence, and unreasonably seized property in which petitioners had a possessory interest all without a search warrant and without an order of any court, authorizing such conduct and without, at that time, having jurisdiction, either over the property seized or the person of the petitioners. The rulings of law as to Counts III and IV of Plaintiff's Petition for Damages by the Trial Court and the determinations of the jury should be affirmed.

Respectfully Submitted,

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April 20, 1994

APPENDIX A

1. OPINION OF THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT 867 S.W.2d 546 (Mo.App. W.D. 1993)

Tony and Juanita ROSS, Respondents,
v.
FORD MOTOR CREDIT COMPANY,
et al., Appellants.

Tony and Juanita ROSS, Appellants,
v.
FORD MOTOR CREDIT COMPANY,
et al., Respondents.

Nos. WD 46531, WD 46567.

Missouri Court of Appeals,
Western District.
Oct. 12, 1993.
As Modified Nov. 23, 1993.

Motion for Rehearing and/or Transfer to
Supreme Court Denied Nov. 30, 1993.

Application to Transfer Denied
Jan. 25, 1994.

Before KENNEDY, P.J., and FENNER and SPINDEN, JJ.

KENNEDY, Presiding Judge.

Plaintiffs, Tony and Juanita Ross, had verdicts and judgments against Ford Motor Credit Company (Ford Motor Credit) for actual and punitive damages on several counts growing out of Ford Motor Credit's repossession in a replevin action of a 1979 Mercury automobile in the possession of the Rosses. Ford Motor Credit has appealed.

The Rosses have cross-appealed from the judgments in their libel and conversion claims against Ford Motor Credit, with the complaint that the trial court erred by reducing the amounts of their actual damages awarded by the jury verdicts, and from the judgment for Ford Motor Credit on their abuse of process claim. They have appealed also from the trial court's denial of their request for attorney's fees in their section 1983 claims against Ford Motor Credit.

The facts are as follows:

The Rosses had in their possession a 1979 Mercury Grand Marquis automobile which they had gotten from North Hills Lincoln Mercury. The Rosses claimed they were test driving the car with a view to purchasing it. North Hills, on the other hand, claimed the Rosses had purchased the car in November, 1979. North Hills claimed that on November 6 and 7, 1979, the Rosses traded in a 1976 Buick Electra automobile, assigned the title thereto, and signed a retail buyer's order, a credit application, and a note for $8,939.04, secured by a security interest in the 1979 Mercury. The note represented the $5,600 balance of the Mercury's purchase price (after a $5,100 allowance for the 1976 Buick), plus finance charges, payable in 48 monthly payments of $186.23 each. The Rosses maintained their signatures had been forged on the documents, and that they had only left the 1976 Buick with North Hills while they were test-driving the

1979 Mercury.

On November 16, 1979, North Hills assigned the Rosses' note and its security interest in the 1979 Mercury to Ford Motor Credit, receiving therefor the amount of $7,078 from Ford Motor Credit. Ford Motor Credit sent the Rosses a loan payment book, which was received by the Rosses on December 19 or 20, 1979.

The Rosses never made any payments to Ford Motor Credit. On January 29, 1980, Richard Van Leeuwen, Ford Motor Credit's assistant branch manager, contacted Mr. Ross. Mr. Ross denied to him that he had purchased the 1979 Mercury. At that time Mr. Ross also told Mr. Van Leeuwen that the North Hills dealer had forged the contract of purchase. Mr. Ross stated he wanted his 1976 Buick back, and wanted to return the 1979 Mercury to North Hills. He would not surrender the 1979 Mercury to Ford Motor Credit, though, because he wanted to use it for leverage to get back his 1976 Buick.

Ford Motor Credit initiated a replevin suit against the Rosses in the Circuit Court of Jackson County. The suit was filed March 4, 1980. The petition, with supporting affidavit, sought immediate possession of the 1979 Mercury, which was stated to have a value of $7,000. Ford Motor Credit posted a forthcoming bond in the amount of $14,000. Circuit Judge Gant signed an ex parte "order of delivery" on March 5, 1980. Alfred Ferguson, a deputy process server of the Jackson County Circuit Court on March 10 repaired to the Ross home at 5406 Byrams Ford Road, Kansas City, Missouri, accompanied by a locksmith provided by Ford Motor Credit. No one was home. The process server allowed the opening of the locked garage door by the

locksmith. The car was delivered to Ford Motor Credit, which removed the car. At 11:30 that night, Mrs. Ross received a telephone call about the replevin from the Sheriff's office. On March 12, the process server delivered to Mr. Ross the order of delivery and the notice of his right to post a redelivery bond, and his right to a hearing under Rule 99.

Other facts will appear later in this opinion. These are enough for present purposes.

Out of this factual matrix sprang a 15-count lawsuit by the Rosses against North Hills, Ford Motor Credit, and others. The Rosses, as noted above, had verdicts against North Hills and against Ford Motor Credit for actual and punitive damages on various counts. The claims against other defendants were disposed of by settlement and dismissal.[1] North Hills has not appealed. The parties to this appeal are only Ford Motor Credit and the Rosses.

COUNTS III AND IV: SECTION 1983 CLAIMS

The Rosses' petition charged Ford Motor Credit in two counts with the deprivation of the Rosses' constitutional rights. The Rosses' theory is that Ford Motor Credit, in

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[1]. One count of the Rosses' 15-count petition was against F.J. Foster, the notary public, and Zurich-American Insurance Companies for false jurat. This count was settled before trial for $7,500. Another count was against the First National Bank of Independence, which had a lien on the 1976 Buick, for breach of trust in releasing the title to North Hills without the Rosses' authority. This count was settled before trial for $3,500.

seizing the Mercury in the manner described above, deprived the Rosses of their constitutional right to due process of law (14th Amendment), and that its seizing the car from their garage constituted an unreasonable search and seizure (4th Amendment). They base their claim upon 42 U.S.C. § 1983. That brief statute reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State. . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

At the conclusion of the evidence, the trial court directed verdicts in favor of plaintiffs on the liability issue on Count III (deprivation of due process) and Count IV (unreasonable search and seizure). The court submitted the two claims on the issues of actual and punitive damages only. On Count III, the jury returned a verdict in plaintiffs' favor for $600 actual damages and $10,000 punitive damages. On Count IV, the verdict was for $150 actual damages and $2.5 million punitive damages.

Ford Motor Credit claims the court erred in directing a verdict for plaintiffs on the issue of liability on the two counts, and claiming the court erred in denying its own motions for judgment n.o.v.

We hold that plaintiffs did not make a submissible section

1983 case under either count.[2]

In order to prevail in a section 1983 action for damages against Ford Motor Credit, the Rosses must show three things: They must show, first, that Ford Motor Credit deprived them of their constitutional rights in the pre-hearing seizure of the 1979 Mercury automobile; second, they must show that, in doing so, Ford Motor Credit was acting in accordance with a state law, or in accordance with a custom or usage of the state; and, third, that the state law, or the state custom or usage, was the cause of, or was the "moving force" behind, the deprivation of constitutional rights.

DEFENDANT'S APPEAL FROM JUDGMENT FOR DEPRIVATION OF PLAINTIFFS' 14TH AMENDMENT DUE PROCESS RIGHTS

There is plainly enough evidence to justify the conclusion that the Rosses were deprived of due process in the seizure of the 1979 Mercury automobile under the court's ex parte order of delivery. The Ford Motor Credit affidavit upon which the order of delivery was based did not allege particular facts which would authorize the order of delivery without according to the replevin defendants an opportunity to be heard. The order of delivery was therefore void, and the seizure made thereunder was improvident, and was a

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[2]. Our determination that plaintiffs made no submissible case on the section 1983 claims obviates the need to deal with Ford Motor Credit's claims of error in the court's failure to submit their good faith defense, see *Wyatt v. Cole*, 994 F.2d 1113 (5th Cir.1993), and their claim that the evidence supported no punitive damages submissions on those counts. Also eliminated from consideration is plaintiffs' claim that the trial court erred in denying their application for attorney's fees.

violation of the Rosses' constitutional rights. *State ex rel. Tallen v. Marsh,* 633 S.W.2d 458 (Mo.App.1982).

To make a section 1983 case for damages against Ford Motor Credit, however, it is not enough to show that Ford Motor Credit deprived them of their constitutional rights in the seizure of their automobile. The Fourteenth Amendment, and section 1983 (which is intended to implement the Fourteenth Amendment, and is coterminous with it, see *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 934-35, 102 S.Ct. 2744, 2752, 73 L.Ed.2d 482 (1982)), are not aimed at private action, no matter how unlawful and discriminatory it may be. It is aimed, rather, at action "under color of state law," or "state action," which in this case are exactly the same thing. *Lugar,* 457 U.S. at 935, 102 S.Ct. at 2752. It might be explained in these terms: If the State, by an unconstitutional law, custom, or usage, equips or aids the private person to deprive another of his constitutional rights, then the private person and the state are joint-participants in the deprivation of constitutional rights, and the private individual becomes liable under section 1983 for the state's action.

Whether Ford Motor Credit's seizure of the automobile was "state action," or whether Ford Motor Credit was a "state actor," is a pivotal question in this case.

If Ford Motor Credit, in securing its pre-hearing order of delivery and in seizing the Rosses' automobile, had acted under an unconstitutional statute or court rule, its action would clearly have been state action. *Lugar,* 457 U.S. at 940, 102 S.Ct. at 2755. *See also North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975); *Mitchell v. W.T. Grant Co.,* 416 U.S.

600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974); *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969).[3]

The replevin rule[4] under which Ford Motor Credit proceeded, though, is not unconstitutional. The rule does not violate due process standards. We specifically so held in *State ex rel. Tallen*, 633 S.W.2d at 460-62. The Rosses in their brief in this court make no claim that the rule is unconstitutional. Ford Motor Credit simply failed to comply with the rule by alleging specific facts which would have supported an ex parte order of delivery. Ford Motor Credit's failure to comply with the requirements of the replevin rule gives the Rosses no section 1983 claim for damages. Ford Motor Credit's action was not state action, but was private action, with which section 1983 has nothing to do. *Lugar*, 457 U.S. at 940, 102 S.Ct. at 2755.

The replevin rule, then, furnishes the Rosses no ground for claiming that Ford Motor Credit's action was state action, for Ford Motor Credit's action did not comply with the replevin rule but was in violation of it. Ford Motor Credit only misused a valid state rule with respect to pre-hearing seizure of replevined property. This gives the Rosses no section 1983 claim for damages against Ford Motor Credit. *Hassett*

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[3]. While *North Georgia Finishing*, *Mitchell*, and *Sniadach* are not section 1983 cases, but are cases finding the respective statutes unconstitutional in the original proceedings instituted by the creditor against the debtor, the *Lugar* opinion says that it was a necessary assumption in those holdings that the creditor's action was state action. *Lugar*, 457 U.S. at 932-33, 102 S.Ct. at 2751-52.

[4]. A statute and a court rule are treated alike for our purposes. *State ex rel. Tallen*, 633 S.W.2d at 460.

v. Lemay Bank & Trust Co., 851 F.2d 1127, 1129 (8th Cir. 1988).

The Rosses turn then to another part of section 1983 to find state action on Ford's part. They turn to the "custom or usage" part of the statute. Their argument is that the issuance of the invalid order of delivery by Judge Gant, and the ensuing improvident seizure of their automobile, was "under color of (a) . . . custom or usage" of the state. Their problems (and ours) are two--first, to find that the invalid order and unconstitutional seizure were in pursuance of a state custom or usage, and, second, as in the case of action taken in pursuance of a statute, that Ford Motor Credit was a "state actor."

For reasons we explain in the following paragraphs, we hold: granting pre-hearing orders of delivery upon factually inadequate applications, if a "custom or usage" in replevin cases in the Circuit Court of Jackson County, was, first, not a custom or usage *of the state*, and, second, the invalid pre-hearing order in the present case was in any event not caused by the custom or usage.

We are unable to see that the invalid order in this case was in any way caused by a "custom or usage" of any kind. It is true there had been over a space of three years, 38 ex parte orders issued by various judges of the Jackson County Circuit Court on affidavits which suffered the same deficiency as the one in this case, namely, the absence of specific facts supporting the claim for immediate

possession.[5] In order to make a case under the "custom or usage" part of section 1983, the Rosses must have shown that the custom or usage was "the moving force [behind] the constitutional violation," that it "actually caused" the deprivation of constitutional rights. *Canton v. Harris*, 489 U.S. 378, 388, 109 S.Ct. 1197, 1204, 103 L.Ed.2d 412 (1989). But none of the invalid orders was referable to, or in pursuance of, any "custom or usage." Each such order was referable to, and in pursuance of, a replevin procedure which was set forth in the court rule, which, as we have noted above, was a valid and constitutional rule. In all other ways, each case was independent of all the others; an earlier order had no precedential value to be followed in a subsequent order. It is not shown that any judge, in signing any one of the invalid orders, knew of any of the other orders--even of those signed by himself. The attorney, or attorneys, who prepared the affidavits, and the respective judges who signed the ex parte orders, in each case misinterpreted the replevin rule. They supposed, incorrectly, that the rule allowed conclusory statements of fact to support plaintiff's claim for immediate possession to the property. In any case, it was open to a lawyer drafting the affidavit to have interpreted the rule correctly and might have alleged particular facts in his affidavit, or a judge might have declined to issue the order except upon sufficiently specific

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[5]. Plaintiffs proved that over a period of three years, in 38 different cases in which Ford Motor Credit was the plaintiff, 15 different judges of the Jackson County Circuit Court had issued pre-judgment orders of delivery in replevin cases upon applications which, like the *State ex rel. Tallen* application and like the one in the present case, were legally insufficient in their statement of supporting facts. Three of the 15 judges had each signed five of the orders of delivery. Five of the 15 judges had signed only one. Four of the orders were in 1979, 19 in 1980, and 15 in 1981.

factual allegations. It was open to any defendant to gain relief from an unconstitutional order from the same judge who issued it. In this case, as a matter of fact, the order of delivery was quashed May 29, 1980, upon the Rosses' motion in the replevin case, for insufficiency of the affidavit in its factual allegations under Rule 99.03. (Ford Motor Credit had in the meantime, on April 9, 1980, voluntarily redelivered the Mercury to the Rosses.)

The Rosses' argument supposes that the mere repetition of orders shows a custom or usage which can be attributed to the state, so that Ford Motor Credit became a state actor when it employed the custom or usage to deprive the Rosses of their constitutional rights. Repeated acts may in some circumstances show a custom or usage. That is not enough, however, to show that the custom or usage was that of the *state*. The custom or usage, to constitute state action, must spring from a state policy.[6] It would be an odd thing that judicial errors on the trial court level could be held to represent a policy of the state.

We have read most carefully *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), looking both for its factual analogy to the present case, and for its language. We do not believe *Adickes* aids the Rosses. *Adickes* was a section 1983 claim against a private defendant,

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[6]. Proof of repeated acts (of constitutional violations) has been made in some cases to show notice to the responsible policy makers of the state. If the responsible policy makers fail to take action to prevent continued constitutional violations, then a plaintiff has shown state action, which may be actionable under section 1983. *See Andrews v. City of Philadelphia*, 895 F.2d 1469 (3rd Cir.1990); *Herrera v. Valentine*, 653 F.2d 1220 (8th Cir.1981).

S.H. Kress and Company, for refusing lunch counter service to a white woman in the company of black companions. Plaintiff Adickes when she left the store was arrested on an unfounded charge of vagrancy, by a policeman who had perhaps been inside the store when the plaintiff was refused service. The trial court had rendered summary judgment for Kress and against the claimant. The Supreme Court reversed and remanded. The Court observed the plaintiff might be able to prove some "understanding" between the waitress and the policeman that plaintiff had not been served. *Adickes*, 398 U.S. at 157, 90 S.Ct. at 1608. The Court held that Kress's discriminatory act would constitute state action "if she proves that Kress refused her service because of a *state enforced custom* of segregating the races in public restaurants." *Id.* at 171, 90 S.Ct. at 1615 (emphasis ours.) Plaintiff Adickes could show state action if "the racially discriminatory act by the private party is *compelled by a statutory provision*" or by a "*custom having the force of law.*" *Id.* (emphasis ours). We fail to find any "state enforced custom" in the present case, or any "custom having the force of law."

We have been unable to find any definition by which one could identify a "custom or usage of (the) state" which, upon its causing the deprivation of constitutional rights, would give rise to a section 1983 action. It would be a rare case where the orders of a nisi prius judge, acting in a judicial capacity, with subject matter jurisdiction, in a dispute between litigants, could be characterized as action of the state. A judge, while in a sense a state official, is not a policy maker of the state. He stands apart from the state. He is no servant of the state. His fealty is first to the constitution of the nation and second to the constitution of the state. When the state and state officials are parties to

litigation before him, they stand on level footing with the citizen.[7]

In sum, there is no evidence that Ford Motor Credit was in any sense a state actor in depriving the Rosses of their 14th Amendment Constitutional due process rights.

DEFENDANT'S APPEAL FROM JUDGEMENT FOR DEPRIVATION OF 4TH AMENDMENT RIGHTS AGAINST UNREASONABLE SEARCH AND SEIZURE

We now take up the Rosses' separately submitted claim that Ford Motor Credit violated their 4th Amendment rights against unreasonable search and seizure. This claim was based upon the actual taking of possession of the 1979 Mercury from the Rosses' locked garage. The trial court, as earlier noted, directed a verdict for the Rosses on liability, and submitted only actual and punitive damages.

The jury, also as earlier noted, by its verdict awarded plaintiffs actual damages of $150 and $2,500,000 punitive damages.

There is evidence that the procedure followed by the deputies in this case in the execution of the order of delivery-

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[7]. The judge's role as a "policy maker," or as an "appointee on the policy making level," as the latter phrase is used in the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-24, is discussed in *Gregory v. Ashcroft*, — U.S. —, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), with the conclusion that judges do not come within the term.

-that is, in standing by while a locksmith opened the door, and allowing the plaintiff to take possession of and remove the property described in the order of delivery--was the usual and ordinary procedure followed by Jackson County process servers in executing replevin orders. The Rosses claim this evidence shows an unreasonable search and seizure within the meaning of the 4th Amendment, and that this violation of their constitutional rights was caused by a state custom or usage within the meaning of section 1983.

The seizure of the automobile from the Rosses' house was not a violation of their 4th Amendment rights. The procedure was justified by section 105.240, RSMo.1986. The Rosses do not claim that section was unconstitutional. The 4th Amendment protects against *unreasonable* searches and seizures. The action of the officers was not unreasonable. They acted in compliance with a court order of delivery which was fair on its face. *See Stafford v. Muster*, 582 S.W.2d 670, 681 [29] (Mo. banc 1979). *Soldal v. Cook County*,--- U.S. ---, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992), does not help the Rosses. There the sheriff's deputies acted without any court order, aiding a landlord to evict a tenant. Said the court:

> Assuming for example that the officers were acting pursuant to a court order, as in *Specht v. Jensen*, 832 F.2d 1516 [(10th Cir.1987)], or *Fuentes v. Shevin*, [407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556] (1972) . . ., and as often would be the case, a showing of unreasonableness on these facts would be a laborious task indeed. Cf. *Simms and Wise v. Slacum*, 3 Cranch 300, 301, 2 L.Ed. 446 (1806).

Soldal, --- U.S. at ---, 113 S.Ct. at 549. Plaintiffs have not

accomplished the "laborious task" of showing an unreasonable search and seizure.

PLAINTIFFS' APPEAL FROM JUDGMENT FOR FORD MOTOR CREDIT ON ABUSE OF PROCESS CLAIM

The Rosses appeal from a judgment in favor of Ford Motor Credit on the Rosses' claim for abuse of process in serving the pre-hearing order of delivery. The trial court directed a verdict for Ford Motor Credit on this count, and it was not submitted to the jury.

The trial court ruled correctly that the Rosses did not make a submissible case against Ford Motor Credit for abuse of process in the replevin action. The distinctive element of an abuse of process cause of action is that the process was intended, not for the ostensible purpose, but for some collateral, ulterior motive. "The essence of abuse of process is not the commencement of an action without justification, but it is the misuse of process for an end other than that which it was designed to accomplish." *Guirl v. Guirl,* 708 S.W.2d 239, 245 (Mo.App.1986). *See also Wells v. Orthwein,* 670 S.W.2d 529, 533 (Mo.App.1984).

Two federal district court cases, with facts and legal claims much like those of the present case, have denied abuse of process claims on the ground there was not shown any improper collateral purpose in initiating an attachment procedure (*Antelman v. Lewis,* 480 F.Supp. 180, 186-87 (D.Mass.1979)), and a garnishment procedure (*Jordan v. Berman,* 758 F.Supp. 269, 280-81 (E.D.Pa.1991)).

In this case, there is no evidence Ford Motor Credit had

any motive for the institution of the replevin suit other than to gain possession of the 1979 Mercury automobile.

Judgment in favor of Ford Motor Credit on abuse of process count is affirmed.

FORD MOTOR CREDIT'S APPEAL FROM CONVERSION CLAIM JUDGMENT

The Rosses' petition in Count VII made a claim of conversion of the Mercury automobile by Ford Motor Credit. The jury awarded the Rosses actual damages of $7,000 and punitive damages of $1,000,000. The trial court subsequently ordered that the actual damage award by reduced to $6,500, the maximum amount supported by the evidence. Ford Motor Credit appeals, claiming that the evidence did not make a submissible case of conversion against it, and claiming that, if the evidence made a submissible case of conversion against it, it did not justify the submission of punitive damages.

We take up first the Rosses' conversion claim against Ford Motor Credit. Ford Motor Credit, tacitly acknowledging the nullity of the order of delivery under which it took possession of the car from the Rosses, does not claim it is shielded from the conversion claim by the order of delivery.

Ford Motor Credit says it had a right to possession of the car under its security agreement executed by the Rosses, which Ford Motor had obtained by assignment from North Hills Lincoln Mercury. The Rosses say, however, that there was no security agreement--that the promissory note and the security agreement were forged. If forged, they were void, and the security agreement gave Ford Motor Credit no claim

to the possession of the car. Section 400.3-104, RSMo.1986, *Universal C.I.T. Credit Corp. v. Hudgens*, 234 Ark. 668, 1127, 356 S.W.2d 658 (1962), 3A C.J.S. *Alteration of Instruments* § 6 (1973). The jury, as shown by its verdict in favor of the Rosses, believed the Rosses' version.

Next, Ford Motor Credit says that if the Rosses had not purchased the Mercury from North Hills Lincoln Mercury, as they testified they had not, it still belonged to North Hills Lincoln Mercury, and Ford Motor Credit was entitled to possession of the Mercury under the lien of a floor plan financing arrangement Ford Motor Credit had with North Hills Lincoln Mercury. On the existence of the alleged floor plan arrangement, the record contains only the oral testimony of Ford Motor Credit's assistant manager that "the dealer closed and we took possession of the vehicles we had financed with them." We do not know if the Mercury was included in the floor plan; there is no testimony that it was. Ford Motor Credit never based its claim to possession of the Mercury on its North Hills Floor plan arrangement, but always and only upon the security agreement allegedly given by the Rosses. The floor plan arrangement, so far as this record shows, gave Ford Motor Credit no right to possession of the Mercury.

The Rosses' evidence, if believed, leads to the conclusion they had possession of the car as bailees from North Hills Lincoln Mercury. It had been delivered into their possession by North Hills for driving and testing, and the Rosses had delivered possession of their own 1976 Buick to North Hills. Their testimony was that they had attempted to return the Mercury to North Hills to reclaim their 1976 Buick, but had been put off. North Hills had not demanded the return of the

Mercury from the Rosses. Apparently, North Hills went defunct during the time the Rosses had the Mercury in their possession. We are unable to see from the evidence that the Rosses were not in rightful possession of the Mercury. The Rosses' rightful possession of the Mercury was sufficient to sustain their conversion claim. *Farmers & Merchants v. Borg-Warner,* 665 S.W.2d 636, 640 (Mo.App.1983), *Price v. Ford Motor Credit Co.,* 530 S.W.2d 249, 255 (Mo.App.1975), 18 Am.Jur.2d, *Conversion* §§ 76, 77 (1985). As between North Hills and the Rosses, we might have a different case. But Ford Motor Credit--given the invalidity of the security agreement--had no right to the possession of the Mercury. When Ford Motor Credit took the car from the Rosses' possession without the consent of the Rosses, and against their will, it converted the Mercury to its own use. *Maples v. United Savings & Loan Ass'n,* 686 S.W.2d 525, 527 (Mo.App.1985); *Farmers,* 665 S.W.2d at 636.

Ford Motor Credit claims the Rosses' verdict against Ford Motor Credit for conversion of the Mercury is inconsistent with their recovery against North Hills Lincoln Mercury for conversion of the 1976 Buick. The effect of this, Ford Motor Credit says, is that the Rosses had judgments for the full value of the Mercury (against Ford Motor Credit), and for full value of the 1976 Buick (against North Hills Lincoln Mercury). If the two verdicts are inconsistent, Ford Motor Credit has not preserved that point for appeal. It did not request at trial any election between these two claims before submission, nor does it object on appeal to the conjunctive submission of both, as opposed to an alternate or disjunctive submission. It made no claim for inconsistency after the verdicts were returned and before the jury was discharged. *See Douglass v. Safire,* 712 S.W.2d 373, 374 (Mo. banc

1986); *Edna Enters., Inc. v. Spirco* Envtl., Inc., 853 S.W.2d 388, 391 (Mo.App.1993).

As to the conversion count, the judgment is affirmed as to actual damages reduced to zero, however, by the set-off applied by the court, as hereinafter discussed.

While the Rosses made a submissible case for conversion of the Mercury automobile, they did not make a case for the submission of punitive damages. In reviewing this issue, we look at the evidence which is favorable to the submission of punitive damages, disregarding all evidence and inferences which are adverse thereto. *Haynam v. Laclede Elec. Coop., Inc.,* 827 S.W.2d 200, 205 (Mo. banc 1992); *Walker v. Gateway Nat'l Bank,* 799 S.W.2d 614, 617 (Mo.App.1990). We are unable to find in the evidence, either by direct evidence or by inference, the evidence that would show Ford Motor Credit's conduct was "outrageous because of (its) evil motive or reckless indifference to the rights of others." *Burnett v. Griffith,* 769 S.W.2d 780, 789 (Mo. banc 1989); MAI No. 10.01; *compare with Clayton X-Ray Co. v. Professional Sys. Corp.,* 812 S.W.2d 565, 567 (Mo.App.1991). The Rosses' own evidence shows nothing more than that Ford Motor Credit initiated a replevin suit for possession of the Mercury, and gained possession of the car. When we are considering the submissibility of an issue, of course, we take only the evidence that tends to support the submission and disregard the rest. If Ford Motor Credit's evidence contains anything to aid the Rosses, the Rosses are entitled to its benefit. We find nothing in Ford Motor Credit's evidence to support the punitive damages submission. Ford Motor Credit knew of the Rosses' claim that the promissory note and security agreement, which belonged to Ford Motor Credit by assignment from North

Hills Lincoln Mercury, was a forgery. Ford Motor Credit did not ignore this claim. There was nothing in the documents themselves that betrayed the fact they were forged.[8]

Ford Motor Credit consulted the Rosses' (then) attorney, who was unable to support the Rosses' claim of forgery. It did not attempt self-help. It turned the matter over to its attorney, who proceeded to file a replevin suit. Ford Motor Credit's pleadings appeared to be regular, or were at least not obviously irregular. *State ex rel. Tallen,* 633 S.W.2d 458, decided by this court in 1982, with its requirement that particular facts had to be alleged in an affidavit for pre-hearing order of delivery, was yet two years in the future. While Ford Motor Credit's order of delivery, signed by Judge Gant, was void because of the absence of particular fact allegations in the supporting affidavit, and while it furnishes Ford Motor Credit no defense to the Rosses' claim of conversion, it has a definite bearing upon Ford Motor Credit's liability for punitive damages. It tends to negate an "evil motive" on Ford Motor Credit's part, and "reckless indifference to (the Rosses') rights."

The award of punitive damages on the conversion count is reversed.

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[8]. A layman could not tell that the signatures of the Rosses had been forged. Ford Motor Credit's handwriting expert, Herman B. Davis, testified that the signature exemplars of Mr. Ross matched the signature of the Rosses on each of several documents, and thus, were penned by the same persons. On the other hand, the Rosses' expert, Avis Odenbaugh, testified that the signatures were not those of the Rosses. The Rosses' expert testified that only an expert could determine whether or not the signatures were forgeries.

FORD MOTOR CREDIT'S APPEAL AND THE ROSSES' CROSS-APPEAL FROM LIBEL JUDGMENT

One count of the Rosses' petition charged Ford Motor Credit with libel. The submission to the jury was that Ford Motor Credit had knowingly or recklessly falsely reported to the Credit Bureau of Kansas City that it "had repossessed the plaintiff's automobile and that plaintiff had redeemed it."

After Ford Motor Credit repossessed the Mercury from the Rosses, it reported the same to the Kansas City Credit Bureau, by means of a form made for the purpose. The repossession was reported by use of three letters, "RPO", which meant, according to a printed Credit Bureau key, "repossession." Later, after Ford Motor Credit had returned the Mercury to the Rosses on April 9, 1980, it apparently reported that fact to the Credit Bureau. Two years later, the Rosses applied to Blue Ridge Bank for an automobile loan. The Credit Bureau report to Blue Ridge Bank on the Rosses' credit history showed the Ford Motor Credit transaction as "RRE," which meant, once again according to the printed key, "Repossession. Redeemed." Blue Ridge Bank because of this Credit Bureau report denied the Rosses' application for a motor vehicle loan. The denial was communicated to the Rosses on a printed form on which the reason for denial of credit was indicated by a check mark in a box before the printed words: "Garnishment, attachment, foreclosure, repossession, or suit."

The jury returned a verdict for the Rosses against Ford Motor Credit for $10,000 actual damages and $1,000,000 punitive damages. The trial court reduced the actual damage award to $1.00. Ford Motor Credit appeals from the

judgment , claiming plaintiffs made no submissible case of libel against Ford Motor Credit. The Rosses also appeal from the judgment, charging the trial court with error in reducing the actual damages award to $1.00.

We hold the evidence made no submissible case of libel against Ford Motor Credit.

The Rosses see a libellous falsehood in the word "repossession," when the Mercury had in fact been replevined. We do not see any significance whatever in that distinction in terminology. Property might be repossessed by self-help, or it might be repossessed through legal procedures. The word "repossession" fits either case. There is no evidence that the one carries any greater or less stigma than the other.

But, the Rosses also argue that the addition of the "redeemed" compounded the injury to their credit. They believe (to amplify their argument somewhat) this would have been interpreted to mean they were delinquent in their payments, and then that they brought their account current after the repossession of the automobile by Ford Credit. This would be an admission that they owed the money represented by the promissory note, which they in fact did not owe, and did not admit owing.

That the "redeemed" part of the Credit Bureau report had anything at all to do with Blue Ridge Bank's denial of credit to the Rosses there is no evidence at all. It was the "repossession" part of the report that caused the bank to turn down the Rosses' application for credit. The bank's denial of credit notice to the Rosses gave as its reason, by checking a box before the printed words: "Garnishment, attachment,

foreclosure, repossession, or suit." L. Keith Lightfoot, the bank loan officer who disapproved the Rosses' credit application, testified there was no other reason for the denial of credit than the reason checked on the notice.

We hold, therefore, that the Ford Motor Credit report of "repossession" of the Mercury was true. Truth is a complete defense to a charge of libel. *Pulliam v. Bond,* 406 S.W.2d 635, 642 (Mo.1966); *Irwin v. Wal-Mart Stores, Inc.,* 813 S.W.2d 99, 102 (Mo.App.1991).

With respect to the "redeemed" part of the report, there was no damage. The Rosses designate their libel case as a case of libel per quod.[9] The action for libel per quod must allege and prove special damages. *Capobianco v. Pulitzer Pub. Co.,* 812 S.W.2d 852, 855 (Mo.App.1991), *citing Swafford v. Miller,* 711 S.W.2d 211 (Mo.App.1986). Damages there were none.[10]

The judgment in favor of the Rosses on their libel count is reversed.

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[9]. Libel per quod is based upon words which, although not defamatory on their face, can be made defamatory by reference to extrinsic evidence. *Capobianco v. Pulitzer Pub. Co.,* 812 S.W.2d 852, 855 (Mo.App.1991), *citing Brown v. Kitterman,* 443 S.W.2d 146 (Mo.1969).

[10]. The Rosses, in their motion for rehearing, or in the alternative for transfer to the Supreme Court, call our attention to *Nazeri v. Missouri Valley College, et al.,* 860 S.W.2d 303 (Mo. banc 1993), decided during the pendency of this appeal. That case abolishes the distinctions between libel per se and per quod, but holds that actual damages must be shown in all cases. The decision has no significance in the present case.

PLAINTIFFS' APPEAL FROM CONVERSION CLAIM JUDGMENT

The Rosses say the court erred in reducing to zero their $6,500 verdict in their claim against Ford Motor Credit for conversion of the 1979 Mercury. The court made this ruling on the ground that the Rosses had fully recovered their damages in a settlement of their claims against notary public F.J. Foster and his bondsman, Zurich American Insurance Company, and First National Bank of Independence for various derelictions and breaches of duty surrounding the forged transfer of title to the Rosses' 1976 Buick. The Rosses testified the 1976 Buick had a market value of $6,500. The amount of the settlement was $11,000, which the court partially set off against the $6,500 conversion verdict against Ford Motor Credit, reducing the judgment to zero.

The court took this action to prevent the Rosses' making a duplicative recovery. When they received the full value of their 1976 Buick, as they did by the $11,000 settlement, they received the full amount of their damages. The Rosses testified, in effect, they were holding the 1979 Mercury only for security for the return by North Hills Lincoln Mercury of their 1976 Buick. When they received the admitted full value of the 1976 Buick, and more, they had recovered in full their damages on this aspect of the case. It does not matter that the torts were different torts, committed by different parties. The Rosses were not entitled to duplicative recoveries. "We . . . reiterate the caveat that duplicate or overlapping damages may not be obtained." *Stafford*, 582 S.W.2d at 679. The court had equitable jurisdiction to make the set-off to avoid the result that the Rosses would make duplicate recoveries for what was essentially the same loss.

Watson v. Harris, 435 S.W.2d 667, 676 (Mo.1968).

The Rosses point out that in their petition against notary public F.J. Foster and his bonding company, Zurich-American Insurance Companies, they asked damages, in addition to the value of their 1976 Buick, for loss of use of the Buick, attorney's fees and litigation expenses, and for emotional distress and mental anguish. In their petition against First National Bank of Independence they asked damages for--in addition to loss of possession of their 1976 Buick--deprivation of use of the Buick, mental anguish and emotional distress, litigation expenses and attorney's fees, and punitive damages. They say the court could not tell what items of damage were included in the $11,000 settlement of these two counts. The court could not therefore tell whether the $6,500 value of the 1976 Buick was included in the $11,000 settlement, and could not determine that a $6,500 recovery for the conversion of the 1979 Mercury was duplicative. There is a certain theoretical logic in this, but the trial court was not obligated to apply theoretical logic over practical sense. The settlement agreement, if there was one, was not before the court. The Rosses might have produced it and placed it in the record, but did not do so. The loss of the 1976 Buick was the only tangible loss suffered by the wrongdoing of the defendants in Count X and Count XI. The court cannot be convicted of error in rejecting the notion that the $11,000 settlement did not include the value of the 1976 Buick.

The judgment for actual damages of zero on the conversion claim against Ford Motor Credit, after setting off the amount received by the Rosses in settlement of Counts X and XI, is affirmed.

CONCLUSION

The judgment for plaintiffs on Count III for actual and punitive damages for deprivation of plaintiffs' 14th Amendment Constitutional rights is reversed. The judgment for plaintiffs on Count IV for actual and punitive damages for deprivation of plaintiffs' 4th Amendment Constitutional rights is reversed. The judgment for defendants on plaintiffs' abuse of process claim is affirmed. Judgment for plaintiffs on conversion claim is affirmed as to actual damages, as reduced to zero by the trial court, and judgment reversed as to punitive damages. The judgment for plaintiffs for actual and punitive damages on libel claim reversed.

Case remanded for entry of a new judgment in accordance with the foregoing opinion.

All concur.

2. NOTICE OF MISSOURI COURT OF APPEALS OVERRULING MOTION FOR REHEARING AND DENYING MOTION FOR TRANSFER TO SUPREME COURT

Missouri Court of Appeals
WESTERN DISTRICT
1300 OAK STREET
KANSAS CITY, MO. 64106-2970

November 30, 1993

IMPORTANT NOTICE

TO: ALL ATTORNEYS OF RECORD

RE: ROSS, TONY AND JUANITA,
RESPONDENT - APPELLANT
vs.
FORD MOTOR CREDIT COMPANY, ET AL.,
APPELLANT - RESPONDENT
WD# 46531

Please be advised that Respondent-Appellant's motion for Rehearing is OVERRULED and motion for transfer to Supreme Court is DENIED. See Rule 83.03. MODIFIED ON COURTS OWN MOTION.

PEGGY STEVENS MCGRAW
CLERK DOCKET ATTORNEY

3. ORDER DENYING TRANSFER TO THE SUPREME COURT OF MISSOURI

IN THE SUPREME COURT OF MISSOURI
No. 76496
W.D. Nos. 46531 & 46567
January Session, 1994

Tony and Juanita Ross, Respondents,
vs. (TRANSFER)
Ford Motor Credit Company, et al., Appellants.

Tony and Juanita Ross, Appellants,
vs. (TRANSFER)
Ford Motor Credit Company, et al., Respondents.

Now at this day, on consideration of respondents' application to transfer the above-entitled cause from the Western District Court of Appeals, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1994, and on the 25th day of January, 1994, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 25th day of January, 1994.

Thomas F. Simon {s} Clerk
_____ D. C.

4. CONSTITUTIONAL PROVISIONS INVOLVED.

U.S. CONSTITUTION, AMENDMENT [IV]
Searches and seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S.CONSTITUTION, AMENDMENT [V]

Due process

No person shall ... be deprived of life, liberty, or property, without due process of law.

U.S.CONSTITUTION, AMENDMENT [XIV]

§ 1. Citizenship rights not to be abridged by states

Section 1. ... no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5. STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

MISSOURI REVISED STATUTE § 105.240

105.240. OFFICERS MAY BREAK DOORS, WHEN.

> Every Officer may break open doors and enclosures to execute a warrant or other process for the arrest of any person, or to levy an execution, or execute an order for the delivery of personal property, if, upon public demand and an announcement of his official character, they be not opened.

MISSOURI REVISED STATUTE § 544.200

544.200. OFFICER MAY BREAK OPEN DOORS

To make an arrest in criminal actions, the officer may break open any outer or inner door or window of a dwelling house or other building, or any other enclosure, if, after notice of his office and purpose, he be refused admittance.
(R.S.1939, § 3889.)

6. MISSOURI RULES OF CIVIL PROCEDURE INVOLVED

RELEVANT PORTIONS OF MISSOURI SUPREME COURT RULE 54 is as follows:

RULE 54.12 SERVICE-IN REM OR QUASI IN REM CIVIL ACTIONS

In civil actions affecting a fund, will, trust estate, specific property, or any interest therein, or any res or status within the jurisdiction of the court, service of process may be made as provided in Rule 54.13, Rule 54.14, Rule 54.16 or Rule 54.17.
(Adopted Jan. 19, 1973, effective Sept 1, 1973.)

RULE 54.13 PERSONAL SERVICE WITHIN THE STATE

(a) How and on Whom Made. Personal service within the state shall be made as follows.:

(1) *On Individual.* Upon an individual, including an infant or incompetent person not having a legally appointed guardian, by delivering a copy of the summons and petition to him personally or by leaving a copy of the summons and petition at his dwelling house or usual place of abode with some person of his family over the age of 15 years, or by delivering a copy of the summons and petition to an agent authorized by appointment or required by law to receive service of process.
(Adopted Jan. 19, 1973, effective Sept 1, 1973.)

RELEVANT PORTIONS OF MISSOURI SUPREME COURT RULE 99. REPLEVIN are as follows:

Pub. Note: Former Rule 99, "Replevin in Courts of Record," consisting of 99.01 to 99.22, was repealed and new Rule 99, "Replevin," consisting of 99.01 to 99.15, was adopted April 4, 1977, effective December 1, 1977.

RULE 99.01 ACTION IN REPLEVIN

A person claiming the right to possession of personal property may bring an action in replevin for possession of the property.
(Adopted April 4, 1977, effective Dec. 1, 1977.)

RULE 99.02 SERVICE OF PROCESS

In replevin actions service of process may be made as provided by Rule 54.
(Adopted April 4, 1977, effective Dec. 1, 1977.)

RULE 99.03 AFFIDAVIT TO OBTAIN IMMEDIATE POSSESSION OF PROPERTY

When a party requests immediate possession of personal property an affidavit shall be filed stating:

(a) The description of the property;

(b) Facts showing the party is entitled to the possession of the property;

(c) The actual value of the property;

(d) The property has not been seized under any legal process;

(e) The party is in danger of losing the property unless immediate possession is obtained or the property is otherwise

secured.
(Adopted April 4, 1977, effective Dec. 1, 1977.)

RULE 99.04 ORDER OF DELIVERY

If the court finds that the facts stated in the affidavit show that the party has the right to immediate possession an order shall be issued directing the sheriff to take possession of the property and deliver it to the party upon compliance with Rule 99.06.
(Adopted April 4, 1977, effective Dec. 1, 1977.)

RULE 99.05 PREJUDGMENT SEIZURE--NOTICE REQUIRED

When a prejudgment seizure of property is made, a written notice shall be served on the defendant advising the defendant of his right to file a delivery bond and of his right to request a hearing to determine the plaintiff's right to possession of the property.
(Adopted April 4, 1977, effective Dec. 1, 1977.)

RULE 99.06 DELIVERY BOND--FORM OF--EFFECT OF FILING

The plaintiff shall file a sufficient bond, approved by the court, executed by the plaintiff as principal and one or more sufficient sureties to the effect that they are bound to the defendant in double the value of the property for the prosecution of the action with effect and without delay, for the return of the property to the defendant, if return thereof be adjudged, and, in default of such delivery for the payment of all damages for injuries to the property thereafter, for the payment of all damages for the taking and detention thereof,

and for all costs.
(Adopted April 4, 1977, effective Dec. 1, 1977.)

RULE 99.07 REDELIVERY BOND--FORM OF

The defendant may file, either before or after delivery of the property to the plaintiff, a sufficient redelivery bond, approved by the court, executed by the defendant as principal and one or more sufficient sureties to the effect that they are bound to the plaintiff in double the value of the property for the delivery of the property to the plaintiff, if such delivery be adjudged, and in default of such delivery for the payment of the value of the property, for the payment of all damages for injury to the property thereafter, for the payment of all damages for the taking and detention thereof, and for all costs.
(Adopted April 4, 1977, effective Dec. 1, 1977.)

RULE 99.08 REDELIVERY BOND--EFFECT OF FILING

If a redelivery bond is filed before delivery of the property to the plaintiff the defendant rnay retain the property. If a redelivery bond is filed after the property has been taken from the defendant an order shall be issued directing the sheriff to take possession of the property and deliver it to the defendant.
(Adopted April 4, 1977, effective Dec. 1, 1977.)

RULE 99.09 HEARING ON RIGHT TO POSSESSION--WHEN--TIME FOR

As an alternative to filing a redelivery bond the defendant may file a written request for a hearing to determine the

plaintiff's right to possession of the property pending trial on the merits. The hearing shall be held within ten days after the filing of the request.
(Adopted April 4, 1977, effective Dec. 1, 1977.)

RULE 99.15 EXECUTION FOR DELIVERY--HOW ISSUED AND GOVERNED

An execution sufficiently describing the property may issue to the sheriff of the county in which the property is located directing him to deliver the property to the party entitled thereto. (Adopted April 4, 1977, effective Dec. 1, 1977.)

7. MARCH 5, 1980 PRE-JUDGMENT ORDER OF DELIVERY IN REPLEVIN

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

FORD MOTOR CREDIT COMPANY,
Plaintiff,
v. Case No. CV80-05018
TONY ROSS,
Defendant.

ORDER OF DELIVERY IN REPLEVIN

Whereas the plaintiff in the above-entitled action of replevin has filed the affidavit provided for in Civil Rule 99.01,

It is hereby ordered that the defendant deliver one 1979 Mercury Gran Marquis, Serial No. 9Z66H653297 to the Court Administrator of Jackson County, Missouri, and it is further ordered that, the Court Administrator, if said property is not delivered to him by the defendant, shall take it from him, and, in either case, the Court Administrator shall deliver said property to the plaintiff.

Dated March 5, 1980.

Jack E. Gant {s}
Judge

8. PERTINENT PORTIONS OF PLAINTIFF'S FIRST AMENDED PETITION FOR DAMAGES IN MULTIPLE ALTERNATIVE COUNTS

FACTS OF OCCURRENCE AND PLAINTIFFS' INJURIES AND DAMAGES

25. That there was at all times hereinafter mentioned, in full force and effect in the State of Missouri, Section 105.240 Revised Statutes of Missouri, which is as follows:

> "105.240. OFFICERS MAY BREAK DOORS, WHEN.
>
> Every Officer may break open doors and enclosures to execute a warrant or other process for the arrest of any person, or to levy an execution, or execute an order for the delivery of personal property, if, upon public demand and an announcement of his official character, they be not opened."

27. There was in full force and effect at all times herein mentioned and had been for many years prior thereto, a custom or usage and official policy in Jackson County, Missouri, whereby process servers upon the request of or at the direction of plaintiff's in Replevin actions would break and enter homes in order to recover personal property under orders of delivery in Replevin under the ostensible authority of revised statutes of Missouri, Section 105.240, and at the express direction of said plaintiffs, but when they were not directed or requested to do so by a plaintiff in a Replevin action, it was the custom usage and policy of said officers when they found no one at home to leave and return at

another time until such time as they found someone at home upon whom to serve Petitions, Summons and Order of Delivery in Replevin together with the Notice required by Rule 99.05.

28. There existed at all times relevant hereto a custom and usage among some of the Judges of the Courts of the 16th Judicial Circuit of Missouri of signing, at the request of attorneys for plaintiffs in Replevin actions filed in their Courts, Orders of Delivery in Replevin, without first conducting a full pre-termination hearing on notice to the defendant, without granting an immediate post termination hearing and without conducting a fact finding procedure of at least minimum reliability, by affidavit or otherwise, culminating in the explicit judicial finding of the Replevinors probable right to immediate possession.

COUNT III

DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE CONSTITUTION OF THE STATE OF MISSOURI, 1945, AS AMENDED, THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND TITLE 42 U.S.C. SECTION 1983

COMES NOW the plaintiff Tony Ross and for Count III of this Petition and the first alternative cause of action against the defendant FMCC, states, alleges an avers:

34. This Count constitutes a suit for damages and an action at law which is authorized by law, Title 42,

U.S.C., Section 1983, to be brought to redress the deprivation under color of state law, statute, ordinance, regulation, custom or usage, of rights, privileges and immunities secured by the Constitution and the laws of the United States. The rights sought to be redressed in this Count are the due process clause guaranteed by the Fifth Amendment to the Constitution of the United States and made applicable to the states by the Fourteenth Amendment to the Constitution of the United States and Title 42, U.S.C., Section 1983, and in violation of Article I, Section 10, Constitution of Missouri, 1945, as amended. This Court has concurrent original jurisdiction with the district courts of the United States to enforce the laws and Constitution of the United States, and Title 42, U.S.C., Section 1983.

35. That the aforesaid acts initiated, directed and procured by defendant, FMCC under color of statute, law, custom and usage and official policy subjected this plaintiff to the deprivation of rights, privileges or immunities secured by the Constitution and Laws of the United States in the following particulars, to-wit:

a. That the affidavit and Petition in Replevin aforesaid filed by the defendant, FMCC, did not meet the minimal requirements of Supreme Court Rule 99.03 in that it did not state facts sufficient for the Circuit Court of Jackson County, Missouri to make a judicial determination of the probable validity of defendants alleged underlying claim of Right to Possession of the aforesaid automobile; that said affidavit and Petition were insufficient to invoke the jurisdiction of the Court and defendant, FMCC, obtained possession of the Mercury automobile by invoking the aid of the Circuit Court of Jackson County, Missouri to accomplish the act when the Circuit Court of Jackson County, Missouri had no jurisdiction either over the person of this plaintiff or

of his property at the time of its issuance of the aforesaid order of delivery in Replevin.

b. That the custom and usage of some of the Judges of the Circuit Court for the 16th Judicial Circuit of Missouri and that of the Circuit Court for the 16th Judicial Circuit of Missouri and that of the Circuit Court in the Replevin action against this plaintiff hereinbefore referred to, in signing orders of delivery in Replevin without a full hearing on notice to the defendant, or without affording an immediate post-termination hearing before delivery of the property seized to the opposing party and without conducting a fact-finding procedure of at least minimum reliability, culminating in the explicit judicial finding of the probable validity of the Replevinors underlying claim of right to possession is unconstitutional and violates the due process clause of Amendment V to the Constitution of the United States, as made applicable to the states by Amendment XIV to the Constitution of the United States; it is also violative of Article I, Section 10 of the Constitution of Missouri, 1945, as amended.

c. The aforesaid method of obtaining possession of the Mercury automobile directed by the defendant was violative of Supreme Court Rules 99.02, 99.05, 54.12 and 54.13(a), (1) and resulted at the express direction of the defendant in this plaintiff being deprived of possession of property without due process of law.

d. Missouri Revised Statutes 1969, Section 533.010 through Section 533.250, as amended, creating and setting forth the statutory action of Replevin in Missouri and Missouri Supreme Court Rules 99.01 through 99.15, superseding the statutes and governing the procedure for the statutory action of Replevin in Missouri, are unconstitutional and violate the due process clause of Amendment V to the Constitution of the United States as made applicable to the

States by Amendment XIV to the Constitution of the United States, because such statutes and Supreme Court Rules permit the taking of property from the defendant in a Replevin action and the delivery of said property to the plaintiff therein, without providing a judicial hearing of any kind prior to its delivery to the plaintiff therein, nor do such statutes and rules require any form of judicial inquiry wherein the defendant in a Replevin action may be present or represented, prior to the taking from the defendant therein and the delivery to the plaintiff therein of the property sought to be Replevined.

36. That by reason of the aforesaid deprivation of the possession of property without due process of law, plaintiff Tony Ross lost possession of the aforesaid 1979 Mercury automobile and was thereby deprived of any means of obtaining the return of his 1976 Buick automobile or its reasonable value and was subjected to much mental anguish and great emotional distress all to his damage in the sum of One Hundred Thousand Dollars ($100,000.00).

37. That the aforesaid acts of the defendant FMCC were willful, wanton or malicious or done with conscious disregard for or complete indifference to the rights of plaintiff Tony Ross and plaintiff Tony Ross is entitled to punitive damages by reason thereof; that plaintiff Tony Ross is also entitled a reasonable sum as and for an attorney's fee incurred by his attorneys herein by reason of Title 42, U.S.C.

COUNT IV

UNLAWFUL SEARCH AND SEIZURE IN VIOLATION OF THE CONSTITUTION OF

THE STATE OF MISSOURI, 1945, AS AMENDED, THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND TITLE 42, U.S.C., SECTION 1983

COME NOW the plaintiffs, and each of them, and for their fourth alternative cause of action and the second cause of action against the defendant FMCC, state, allege and aver:

38. This Count is a suit for damages and an action at law which is authorized by law, Title 42, U.S.C., Section 1983 to be brought to redress to deprivation under color of state law, statue, ordinance, regulation, custom or usage, of rights, privileges and immunities secured by the Constitution and the laws of the United States. The rights here sought to be redressed are rights guaranteed by the Fourth Amendment to the Constitution of the United States and the Constitution of Missouri, 1945, as amended, and Title 42, U.S.C., and this Court has concurrent original jurisdiction with the District Courts of the United States enforcing the laws and the Constitution of the United States.

39. That the aforesaid acts initiated by the defendant FMCC, in causing the breaking and entering of the home of these plaintiffs constituted an unreasonable and unlawful search and seizure in violation of rights guaranteed by the Fourth Amendment to the Constitution of the United States and made applicable to the states by the Fourteenth Amendment to the Constitution of the United States, Title 42, U.S.C., Section 1983 and Article I, Section 15, of the Constitution of the State of Missouri, 1945, as amended.

40. That Missouri Revised Statute, Section

105.240 in so far as it purports to authorize officers executing an Order for the delivery of personal property in purely Civil matters to break open and enter into homes and enclosures when no one is at home, is unconstitutional and subjects the victims thereof and particularly these plaintiffs to unreasonable search and seizure and search without warrant, all in violation of the Fourth Amendment to the Constitution of the United States.

41. Following the aforesaid unreasonable and unlawful search of plaintiffs home and unlawful seizure of the Mercury automobile aforesaid, defendant acting by and through its agents, servants or employees or the Civil Process Server acting at the direction of defendant, FMCC, caused the door of the garage attached to plaintiffs home to be closed and locked with a dog contained therein, that the dog got into trash barrels located in said garage scattered trash all over the garage and tore up and damaged other personal items of plaintiffs; by reason of the aforesaid unreasonable and unlawful search of plaintiffs home and unlawful seizure of the Mercury automobile aforesaid plaintiffs have been damaged in such sum as will fairly and justly compensate them for the unlawful and unreasonable search of their home and the seizure of the aforesaid Mercury automobile and have been further damaged by suffering humiliation, embarrassment and loss of standing in their community and their reputation among their neighbors and in their community was thereby damaged and impaired and plaintiffs are entitled to a reasonable sum as and for attorneys fees for their attorney incurred herein, all, in such sum as will fairly and justly compensate them therefor, not to exceed the sum of Five Hundred Thousand Dollars ($500,000.00).

42. That the aforesaid acts of the defendant FMCC were willful, wanton or malicious or done with complete indifference to or conscious disregard for the rights of plaintiffs and plaintiffs are entitled to punitive damages therefor.

Supreme Court, U.S.
FILED
MAY 17 1994
OFFICE OF THE CLERK

(2)

No. 93-1681

In The

Supreme Court of the United States

October Term, 1993

TONY AND JUANITA ROSS,

Petitioners,

v.

FORD MOTOR CREDIT COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Missouri Court Of Appeals Western District

RESPONDENT'S BRIEF IN OPPOSITION

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19 pp

QUESTIONS PRESENTED

1. Did the Rosses present sufficient evidence at trial to establish a state-enforced judicial custom under 42 U.S.C. § 1983?

2. Is § 105.240 of the Missouri Revised Statutes unconstitutional?

LIST OF PARTIES

The parties to the proceedings in the Missouri Court of Appeals, Western District, were the Petitioners Tony Ross and Juanita Ross and the Respondent Ford Motor Credit Company.

Pursuant to Supreme Court Rule 29.1, Ford Motor Credit Company identifies Ford Motor Company, a Delaware corporation, as its parent company and the following companies as subsidiaries and affiliates that are not wholly owned but have private investors.

SUBSIDIARIES WITH PRIVATE INVESTORS:

Ford Holdings, Inc., a Delaware corporation; Fairland Woods Associates, a partnership; Renaissance Center Partnership, a partnership; and First Nationwide Network, Inc., a Delaware corporation.

AFFILIATES WITH PRIVATE INVESTORS:

Aston Martin Lagonda Group Limited, Newport Pagnell, Bucks, England; Ford Werke AG, Cologne, Germany; Ford Motor Company A/S, Copenhagen, Denmark; Ford Nederland B.B., Amsterdam, The Netherlands; Ford Motor Company (Belgium) N.V., Antwerp, Belgium; Oy Ford Ab, Helsinki, Finland; Ford Motor Company of Canada, Limited, Oakville, Canada; and Ford LIO HO Motor Company LTD., Taipei, Taiwan.

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No. 93-1681

In The

Supreme Court of the United States

October Term, 1993

TONY AND JUANITA ROSS,

Petitioners,

v.

FORD MOTOR CREDIT COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Missouri Court Of Appeals Western District

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Ford Motor Credit Company respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Missouri Court of Appeals, Western District, in this case.

OPINION BELOW

The opinion of the Missouri Court of Appeals, Western District, as modified on its own motion, is reported at 867 S.W.2d 546 (Mo. App. 1993) and is included in the Appendix to the Petition at pp. 1a-26a.

JURISDICTION

On November 30, 1993, the Missouri Court of Appeals, Western District, denied the Rosses' motion for rehearing and/or transfer to the Supreme Court of Missouri (*see* Appendix to Petition at p. 27a). The Supreme Court of Missouri denied the Rosses' application for transfer on January 25, 1994 (*see* Appendix to Petition at p. 28a). Although the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a), the Court is without jurisdiction to hear the second question presented in the Petition because it was not properly raised or presented in the Missouri state courts below. United States Supreme Court Rule 14.1(h); *infra* at pp. 7-9.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent Ford Motor Credit Company accepts the Rosses' statement of the constitutional and statutory provisions at issue, with the exception of Mo. Rev. Stat. § 544.200 (1986) and Missouri Supreme Court Rules 54.12 and 54.13, which have never been at issue in this case.

STATEMENT OF THE CASE

The factual background of this case is correctly set forth in the opinion by the Missouri Court of Appeals. A summary and some historical context follow.

The events at issue occurred more than fourteen years ago. On March 5, 1980, Ford Motor Credit Company

("Ford Credit") undertook to replevin a 1979 Mercury Marquis automobile from Mr. Ross. The replevin action was instituted after an investigation by Ford Credit's assistant branch manager, in which he contacted Mr. Ross, an attorney for Mr. Ross, and the salesman at North Hills Lincoln Mercury, where Mr. Ross had obtained the automobile. Having received conflicting versions of the facts, Ford Credit sought the judicial remedy of replevin pursuant to Rule 99 of the Missouri Supreme Court Rules instead of using self-help. Ford Credit's outside counsel, James Lowe, prepared and signed the replevin petition and affidavit.

On March 10, 1980, the Mercury Marquis automobile was replevined when the Rosses were not at home. That evening, the deputy process server contacted the Rosses and advised them that the car had been replevined. On March 12, 1980, the Rosses were served a copy of the summons and all process, including:

(a) notice of the replevin pursuant to Missouri Supreme Court Rule 99.05;

(b) notice of the Rosses' right to request a hearing pursuant to Rule 99.05; and

(c) notice of the Rosses' right to post a redelivery bond pursuant to Rule 99.05.

Prior to obtaining the order of delivery, Ford Credit had posted a replevin bond in the amount of $14,000, double the fair market value of the automobile, as required by Missouri Supreme Court Rule 99.06. A post-seizure hearing was scheduled for April 10, 1980, but the Rosses opposed such a hearing and instead filed a motion to quash the order of delivery. On April 11, 1980, Ford

Credit voluntarily returned the automobile to the Rosses. On May 29, 1980, Circuit Court Judge Jack E. Gant granted the Rosses' motion to quash. The Rosses then filed state-law counterclaims against Ford Credit for conversion and trespass. In July 1981, Ford Credit's replevin action and the accompanying counterclaims were dismissed without prejudice by the agreement of both parties.

On May 4, 1982, two years after the occurrences at issue here, the Missouri Court of Appeals held in *State ex rel. Tallen v. Marsh*, 633 S.W.2d 458 (Mo. App. 1982), that the form of the affidavit previously used by Ford Credit to obtain orders of delivery in replevin actions was conclusory and did not state facts with the specificity required by Missouri Supreme Court Rule 99.03. The court, however, suggested that the conclusory nature of the affidavit could be cured in future replevin actions by attaching and incorporating by reference the retail installment contract that set forth the terms upon which the financing and the replevinor's right to retake possession of the car were based. 633 S.W.2d at 461.

On November 5, 1982, the Rosses filed this case. After many delays, the case proceeded to trial nearly ten years later on March 16, 1992.

At trial the parties stipulated that in thirty-eight separate replevin actions handled by Mr. Lowe or his law firm between September 4, 1979 and December 9, 1981 a replevin petition, affidavit and a proposed order of delivery similar in form to that used in the replevin action against Mr. Ross were filed on behalf of Ford Credit. There was no evidence regarding the use or acceptance of

such affidavits in the Circuit Court of Jackson County, Missouri by anyone other than Ford Credit. Moreover, there was no evidence:

(a) that any Jackson County Circuit Court Judge knew of the issuance of the other orders of delivery received by Ford Credit;

(b) that Circuit Court Judge Gant relied on such previous orders in issuing the order of delivery involved in this case;

(c) that Ford Credit acted in any way to improperly induce Judge Gant or any other Jackson County Circuit Court Judge to issue an order of delivery; or

(d) that Ford Credit (or any other replevinor) has ever used a conclusory affidavit in a replevin action in the dozen years since the 1982 *Tallen* decision.

Only three of the fifteen counts of the Rosses' petition (complaint) are pertinent here. Two counts alleged that Ford Credit violated 42 U.S.C. § 1983 (Counts III and IV), and Count VII alleged that Ford Credit committed the tort of conversion. The trial court directed verdicts in favor of the Rosses on both § 1983 counts and refused to submit to the jury Ford Credit's good faith defense. On the conversion count, the jury found in favor of the Rosses.

On appeal, Ford Credit argued that the Rosses had failed to make a submissible case on both of the § 1983 counts and that, even if the Rosses had made a submissible § 1983 case, Ford Credit should have been permitted to submit its good faith defense to the jury. *See Wyatt v. Cole*, ___ U.S. ___, 112 S. Ct. 1827 (1992). Ford Credit also

argued that there was no evidence to support the submission of punitive damages to the jury on any count. The Court of Appeals agreed with Ford Credit and held that the Rosses had failed to make a submissible case on their § 1983 claims. Appendix to Petition at pp. 5a-6a. The Court of Appeals further held that, although plaintiffs presented a submissible conversion claim, there was no evidence to support an award of punitive damages. Appendix to Petition at p. 19a. The court also held that the Rosses had fully recovered their damages through an out-of-court settlement, and thus the actual damages award of zero against Ford Credit under the conversion count was proper. Appendix to Petition at p. 25a.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS CASE INVOLVES A FACTUAL AND HISTORICAL ANOMALY THAT HAS NOT RECURRED SINCE 1982 AND THUS DOES NOT CONCERN A MATTER OF GENERAL OR CONSTITUTIONAL IMPORTANCE WARRANTING REVIEW BY THIS COURT

The questions presented by the Rosses in their Petition for Writ of Certiorari stem from the replevin of a 1979 Mercury by Ford Credit in March 1980 – over fourteen years ago. At trial and on appeal, the Rosses premised their claims on the fact that the replevin affidavit lacked sufficient specificity when viewed in light of the pleading requirements set forth in *State ex rel. Tallen v. Marsh*, 633 S.W.2d 458 (Mo. App. 1982) – a decision handed down more than two years after the replevin

events in this case. Based on evidence that Ford Credit had obtained replevin orders in other cases using the same form of affidavit, the Rosses alleged that the 1980 replevin order involving them resulted from an unconstitutional custom or practice of the Jackson County, Missouri, Circuit Court judges. There was no evidence that the conduct complained of here continued after the *Tallen* decision. Thus, this case has no general significance to the citizens of the United States or of Missouri.

Moreover, the questions presented for review have no impact on the ultimate judgment in this case. The Missouri Court of Appeals determined that the Rosses had fully recovered their actual damages and that Ford Credit's conduct did not warrant the submission of punitive damages to the jury. Appendix to Petition at pp. 24a and 19a. These unchallenged holdings on damages render academic, even to these parties, the liability questions under § 1983.[1]

II. THE ROSSES HAVE EITHER WAIVED OR FAILED TO PROPERLY PRESERVE ANY CHALLENGE TO THE CONSTITUTIONALITY OF MO. REV. STAT. § 105.240 (1986) OR MISSOURI SUPREME COURT RULE 99

The Rosses conceded in the Missouri Court of Appeals that they were not challenging the constitutionality of either Missouri Supreme Court Rule 99 or Mo. Rev. Stat. § 105.240 (1986). The Missouri Court of Appeals

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[1] The actual damages on the two § 1983 counts totalled only $750.

confirmed that the Rosses' appeal did not challenge the constitutionality of either the rule (Appendix to Petition at p. 8a) or the statute (Appendix to Petition at p. 14a). The constitutional challenges were not, and could not have been, presented to or decided by the Missouri Court of Appeals because, under Missouri procedure, the Supreme Court of Missouri has exclusive jurisdiction over challenges to the constitutionality of Missouri statutes. Missouri Constitution Art. V, Sec. 3, *quoted in* Appendix at App. 1. By permitting this appeal to proceed in the Missouri Court of Appeals rather than the Supreme Court of Missouri, the Rosses waived these constitutional challenges. *McLeran v. St. Luke's Hosp. of Kansas City*, 687 S.W.2d 892, 893 (Mo. banc 1985); *State ex rel. Union Elec. Co. v. Public Serv. Comm'n*, 687 S.W.2d 162, 165 (Mo. banc 1985); *accord Parker v. Illinois*, 333 U.S. 571, 573-74 (1948); *Central Union Tel. Co. v. City of Edwardsville*, 269 U.S. 190, 193-95 (1925).

Moreover, the only federal question ruled upon by the Missouri Court of Appeals was whether the Rosses had made a submissible case under 42 U.S.C. § 1983. The Missouri Court of Appeals did not rule upon the constitutional challenges to Mo. Rev. Stat. § 105.240 (1986) and Missouri Supreme Court Rule 99 that the Rosses now ask this Court to decide. The petitioners concede as much in their statement of the case wherein they note "it was not necessary to challenge" the constitutionality of Mo. Rev. Stat. § 105.240 (1986) on appeal. Petition at p. 8. Because the lower courts did not rule upon the second question presented by the Rosses in their Petition and because that question was not properly raised or presented before the appellate courts of Missouri, it is not subject to review by

this Court. United States Supreme Court Rule 14.1(h); *Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 435 (1940).

III. THE MISSOURI COURT OF APPEALS' DETERMINATION THAT THE ROSSES FAILED TO MAKE A SUBMISSIBLE CASE UNDER 42 U.S.C. § 1983 IS CORRECT AND DOES NOT CONFLICT WITH DECISIONS OF THIS COURT

The Missouri Court of Appeals correctly determined that the Rosses had failed to make a submissible case under 42 U.S.C. § 1983 on their due process claim (Count III) and their unreasonable search and seizure claim (Count IV). Appendix to Petition at pp. 5a-6a. After an exhaustive review of the trial record, the Missouri Court of Appeals concluded, "We fail to find any 'state enforced custom' in the present case, or any 'custom having the force of law.' " Appendix to Petition at p. 12a. The Missouri Court of Appeals reached this conclusion because all that the evidence established was that certain trial court judges had made errors of law by misinterpreting the requirements of a Missouri Supreme Court Rule. There was no evidence that any of the judges sitting on the Jackson County Circuit Court knew of the issuance of the erroneous orders of delivery by other judges or even those previously issued by themselves. Thus, the Court of Appeals held that there was no evidence that a state policy was the cause of the alleged deprivation. Appendix to Petition at p. 10a. Misinterpretation of a rule or statute by trial judges in separate and independent cases does not constitute a policy or custom when there is no

evidence that the judges actually knew of and acted pursuant to a policy or custom.[2]

Contrary to the Rosses' assertion (Petition at pp. 13-18), this holding is consistent with *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), and *Dennis v. Sparks*, 449 U.S. 24 (1980).[3] In *Adickes*, judgment was entered for the defendant by the trial court on motion for summary judgment. The case was remanded because no opportunity had been provided to present evidence on the issue of whether "the policeman and a Kress employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service" as part of a "state enforced" custom of segregation. 398 U.S.

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[2] In any event, even though the replevin order may have been void under *Tallen*, the Rosses were provided constitutional due process. Pursuant to Rule 99's mandate, Ford Credit posted a delivery bond in an amount double the fair market value of the automobile and the Rosses were given notice of their right to a post-seizure hearing and to post a redelivery bond. Additionally, Missouri law provided for, and the Rosses asserted, post-replevin causes of action for the deprivation alleged (*i.e.*, their counterclaims for conversion and trespass). These post-deprivation procedures and remedies provided the Rosses with adequate procedural due process of law. *See Zinermon v. Burch*, 494 U.S. 113 (1990) (state-law remedies for erroneous deprivations satisfy due process standards); *Parratt v. Taylor*, 451 U.S. 527, 537 (1981) (overruled in part, not relevant here, by *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986)).

[3] The third case principally relied on by the Rosses, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), is readily distinguished. In that case, the constitutionality of Virginia's prejudgment attachment statute was challenged. By contrast, in this case an alleged custom, separate and apart from a constitutional statute, was at issue.

at 158. Moreover, in *Adickes* there was evidence that Kress' refusal to serve the plaintiff was motivated in part by Mississippi's previously enforced custom of racial segregation. *Id.* at 173. In *Dennis*, there was evidence that a state court judge had been bribed and thus had unlawfully "conspired" with private litigants to deprive the plaintiffs of constitutionally protected rights. 449 U.S. at 29.

In this case, by contrast, there was no evidence of any conspiracy nor evidence that any judge was motivated by or acted in a manner that was caused by a policy or custom of the State of Missouri. This case, unlike *Adickes* and *Dennis*, involved nothing more than a private litigant who, in a series of separate replevin actions, obtained orders of delivery based on a form of affidavit later determined to be insufficient under state law.[4] As stated by the Court in *Dennis*, "merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge." 449 U.S. at 28.

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[4] Petitioners' recourse for the improper replevin was a cause of action for conversion, which they pursued.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

CONSTITUTION OF MISSOURI

Article V, Section 3.

Section 3. Jurisdiction of the supreme court. The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity of a treaty or statute of the United States, or of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office and in all cases where the punishment imposed is death. The court of appeals shall have general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the supreme court.